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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1488

CARLOS MARCELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Carlos Marcello, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed a judgment of conviction of the United States District Court for the Southern District of Texas.

OPINIONS BELOW

The District Court opinion (Appendix A) denying reconsideration of the order changing venue is reported at 280 F. Supp. 510. The judgment of conviction was filed herein

on September 12, 1968. The Court of Appeals opinion (Appendix B) was filed on February 18, 1970. Its judgment of affirmance was entered on the same day (Appendix C). A petition for rehearing was denied on April 1, 1970 (Appendix D).

JURISDICTION

The judgment of the Court below was entered on February 18, 1970 (Appendix C) and the order denying rehearing was filed on April 1, 1970. (Appendix D). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court erred in submitting the issue of intimidation to the jury after such issue had been eliminated by court ruling during a prior trial. Was petitioner subjected to double jeopardy? Was the District Court in error in permitting the jury to consider as intimidation petitioner's statement to an F.B.I. agent that "I am the boss here. This is my town"? Was it proper for the Court of Appeals to avoid this issue and designate as intimidation an alleged battery when such theory was not advanced or presented in the District Court?

2. Whether the District Court erred in changing venue from the Eastern District of Louisiana over the specific objections of petitioner upon a pretrial finding that he could not receive a fair trial in Louisiana.

3. Whether the District Court erred in refusing to charge the jury that knowledge by petitioner that Patrick J. Collins was an F.B.I. agent engaged in the performance of his duties was an element of the offense herein.

4. Whether the District Court erred in refusing to charge the jury that the offense herein could not be committed by intent to cause a mere offensive touching but required a willful attempt and intent to inflict violent or serious injury.

5. Whether the District Court erred in refusing to grant a mistrial when prosecuting officials in their closing argument improperly referred to a document not in evidence and improperly accused defense counsel of unfairness and manufacturing evidence.

6. Whether the District Court erred in refusing to dismiss the indictment upon the ground that petitioner had been granted immunity from prosecution by a New York State Grand Jury. (The issue herein may be controlled by *Picirillo v. New York*, No. 1249 cert., granted March 21, 1970). Was the Court of Appeals in error in asserting that a State cannot grant immunity for a federal crime?

7. Whether the District Court erred in sentencing petitioner to two years imprisonment and a $5,000.00 fine for an assault, designated as non-aggravated, upon the basis of "brushes with the law," other indictments which resulted in acquittals, and assertions of Fifth Amendment privilege before a Congressional Committee.

STATEMENT OF THE CASE

A. Indictment and Pretrial Proceedings

On October 7, 1966, petitioner was indicted in the Eastern District of Louisiana in one count for assaulting and intimidating F.B.I. agent Patrick J. Collins at the Moissant International Airport in New Orleans, Louisiana, on September 30, 1966, in violation of 18 U.S.C. 111 (No. 30538B). This indictment was dismissed on June 5, 1967, for failure to comply with *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir., 1966).

On June 1, 1967, petitioner was reindicted (No. 30888-B). Petitioner moved to dismiss the indictment for failure to state an offense (R. 17), and by reason of the grant of immunity (R. 24). Other motions included those for a change of venue and a continuance (R. 3).

Pretrial motions were set for hearing before District Judge Heebe on September 13, 1967, when the Court limited argument to the motion for a change of venue and continuance (R. 55-70). Government counsel submitted on the motion without argument. Counsel for petitioner advised the Court that his motion was only for a five month continuance by reason of adverse publicity. He stated (R. 59-61, 63-64):

> "Mr. Wasserman: Yes, and my motion this morning, this afternoon, is for a five-month continuance. I feel that we should not be obliged to try this case in this atmosphere at this time. I am, naturally, withdrawing a request for a change of venue—I beg your pardon—I am not pressing my request for a change of venue at this time.
>
> "The Court: All right. You mention the Delaney case, and I thought you were mentioning it in support of the motion for change of venue.
>
> "Mr. Wasserman: No. I am only pressing at this time the request for a postponement***.
>
> "Mr. Neff: As I understand the nature of the motion, your Honor, he is moving for a continuance of this matter for five months.
>
> "Mr. Wasserman: That is correct.
>
> * * *
>
> "Mr. Wasserman: * * * we have again adverse publicity and it is for this reason that I am anxious to have this case postponed until sometime after election, to reassess the effect of that adverse publicity at that time.
>
> * * *
>
> "The Court: * * * I will grant the motion for change of venue and leave all other motions * * *"

Ten minutes after the argument defense counsel appeared in the Court's chambers and requested withdrawal of the change of venue order (R. 99), upon the ground that it was contrary to petitioner's express wishes (R. 72-73).

At the Court's suggestion a written motion for reconsideration was filed one day later on September 14, 1967, together with an affidavit by Marcello which stated that he objected to a change of venue, had so advised his attorney prior to the argument and that he did not waive his constitutional right to a trial in the place where he was charged with the crime herein (R. 42-45, 100). Marcello's affidavit of September 14, 1967, stated (R. 45):

> "I do not waive my constitutional right under the Sixth Amendment to a trial in the place where I am alleged to have committed the crime herein. * * * I do not consent to a change of venue outside of New Orleans and in particular to anyplace designated by the Government or the Court. I, therefore, request reconsideration of the Court's order."

The motion for reconsideration was argued on September 22, 1967. Permission was specifically requested for leave to abandon the motion for change of venue (R. 43, 79).

The Government asserted that it was again submitting the matter without argument. The Court orally observed that "this is a novel issue insofar as any jurisprudence is concerned" (R. 80), and kept the motion under advisement for over five months. On March 1, 1968, in a written opinion and order (*United States v. Marcello*, 280 F. Supp. 510 E.D. La., 1968) it was directed that the case be transferred to the Southern District of Texas. The Court found that prejudicial publicity prevented a fair trial in Louisiana, that the statements of petitioner's counsel that he was not pressing the motion for a change of venue was not abandonment of it, that Marcello's affidavit does not state that he "did not want a change of venue in any event," that Marcello merely preferred a continuance, that when the motion for a change of venue was granted orally Marcello made a binding election and waived his Sixth Amendment rights, that Marcello was granted the relief he requested and that Marcello could only receive due process and a fair trial by a change of venue (R. 98-132).

The various motions to dismiss the indictment were heard before District Judge Connally in Texas on March 22, 1968. Testimony was adduced to show that on November 4, 1966, and on May 3, 1967, after claiming self-incrimination, petitioner was granted complete immunity by the Grand Jury of Queens County, New York, from any prosecution, and relieved from any penalty on account of any transaction concerning which he gave testimony. Testimony was given relative to the incident herein (March 22, 1968, Tr. 27, 53). Judge Connally denied all of petitioner's motions to dismiss (R. 197-206). A trial before Judge Connally in Laredo, Texas, resulted in a hung jury and mistrial on May 29, 1968 (R. 692).

Prior to the mistrial, Judge Connally ruled and advised the jury (R. 688).

> "So I think for practical purposes you may forget the part 'and intimidate' and consider the indictment as though the charges were only as to assault."

The case was thereafter reset before District Judge Singleton who refused to eliminate the intimidation issue from the case despite a claim of double jeopardy (R. 1284) and assertions by the defense that no intimidation was established as a matter of law (R. 1327-1330, 1335). The District Judge declared that Marcello's statement "I'm the boss of this town. This is my town" could be interpreted and found to be an intimidation (R. 1328). The jury was permitted over objection (R. 1326) to find either an assault or an intimidation. On August 8, 1968, a verdict of guilty was returned (R. 1413-1414). On September 12, 1968, petitioner was fined $5,000.00 and sentenced to two years imprisonment (R. 1510).

B. Evidence Developed At The Trial

On September 30, 1966, petitioner's counsel informed the F.B.I. in New York City in response to its request that petitioner and his brother, Joseph Marcello, would proceed

from New York City to New Orleans, by Delta Airlines. This was done with petitioner's approval (R. 1172-4). Upon arrival at the Moissant International Airport in New Orleans, petitioner was surrounded by a group of news photographers and newspapermen who followed him from the point of deplaning through the airport and to his son's car which was parked on the outer ramp. F.B.I. agents, Joseph Avignone and Patrick J. Collins, were assigned to take photographs and conduct surveillance of Marcello at the airport. Collins, in shirt sleeves holding his suit jacket, posed as a deplaning passenger (R. 858-9, 887-8, 931-3, 979). Avignone, in shirt sleeves, carried a camera and took photographs (Gov't Ex. 6). Neither agent identified himself to Marcello (R. 887-8).

After reaching the upper ramp outside the airport building, petitioner, angrily and with some profanity, inquired whether the photographers had secured enough pictures. Collins, with his hands folded, asserted in the negative. Thereupon, Marcello asked: "Are you looking for trouble?" Collins replied: "I can handle trouble" (R. 939). There is confusion among prosecution witnesses as to what happened next and contradiciton by defense witnesses as to the events which followed.

Complaining and chief prosecution witness, F.B.I. agent Collins, testified that the report (Gov't Exhibit 7)[1] he prepared immediately after the incident contained a full, complete and true account of the incident herein (R. 965). This report, introduced in evidence by the Government (R. 1002), stated:

> "SA JOSEPH M. AVIGNONE was standing with the photographers carrying a camera. It appeared to me that the MARCELLOs might take immediate physical action against the photographers and newspapermen so I moved up through the crowd toward the

---

[1]Originally Defendant's Exhibit 3 for identification (R. 965).

MARCELLO party and took a position next to SA AVIGNONE, facing CARLOS and JOSEPH MARCELLO.

CARLOS MARCELLO directly faced me and said "I'm the boss here. Are you looking for some (obscene) trouble?" I crossed my hands on my chest and stated to CARLOS MARCELLO, "I can handle trouble."

CARLOS and JOSEPH MARCELLO simultaneously closed the distance between myself and them, and CARLOS MARCELLO brought his right hand with his fist closed toward me in a roundhouse blow. Simultaneously with his commencing of a blow, JOSEPH MARCELLO grabbed his arm and attempted to restrain him. I immediately took a counterpunch position with my hands open.

CARLOS MARCELLO did not get to strike a blow due to his brother's immediate action and the unknown individual's action shortly thereafter. I struck no blow due to the fact that I would not strike a blow unless one of these individuals struck first."

Collins, 39 years of age, an athlete with training in defensive tactics, 6'1" tall and 185 pounds, testified that non-athletic Marcello, 58 years of age, and 5'2" tall (R. 947-950, 1202, 1206), first jabbed with his left, that if bodily contact with the left was made he did not feel it and that he was not paying attention to Marcello's left hand (R. 941, 955). He was only apprehensive of harm for a split second from the right hand (R. 955). He could not identify the photograph (Gov't Ex. 6) in the sequence of events (R. 945, 970-1). He posed as a deplaning passenger, did not identify himself as an F.B.I. agent, and Marcello did not impede, interfere or resist Collins (R. 878, 972, 979). He was not directed to engage Marcello in conversation and when he said he could handle trouble the physical action started (R. 980, 995). He denied stating to four defense witnesses that the incident was an accident ~~with~~ which later got out of hand.

F.B.I. agent Avignone testified that petitioner swung a single right in the direction of Collins and saw no other movement. He saw no contact and observed no interference with Collins' surveillance (R. 946, 880-1, 902-4, 908).

Prosecution witness, Jack Thornell, an Associated Press photographer, took a photograph of the incident (Gov't Exhibit 6) which shows Marcello's right hand at his side (R. 921, 924, 929). Thornell only saw a movement of Marcello's left hand. He observed that Collins was relaxed and not in fear and Collins commented to him that no contact was made, that he was not hurt and that Marcello was an "old man" (R. 927-9).

Patrick Nolan, a New Orleans police official, testified for the prosecution that he was unaware of the identity of the two F.B.I. agents at the time, that Marcello drew his left hand across his body with a cupped hand, not a full fist, and that his left hand made contact with Collins' neck and shoulder region. There was no roundhouse right (R. 1033-4, 1047-8).

Reporter, William Elder, subpoenaed as a Government witness and called by both sides, testified that Collins told him at the time of the incident that he was not afraid of Marcello, he did not think he was going to be thrown off the concourse, that he did not want to hurt that old man, and would not lay a finger on him (R. 1082-5).

Reporter M.J. Gauthier, called in rebuttal by the prosecution, asserted that Marcello struck Collins on the right cheek with a left hand (R. 1293, 1299, 1308).

The following chart is a summary of the Government's confused and inconsistent version of the alleged assault:

THE ALLEGED MARCELLO ASSAULT
(Government Version)

Government Eye-witness	Hand allegedly used by Marcello	Whether bodily contact made with Collins	Record Reference
Patrick J. Collins, F.B.I.	Right hand fist*	None	Gov't Ex. 7, R. 965, 941, 955.
Joseph Avignon, F.B.I.	Only right hand	None	R. 880-1, 903-4, 908.
Jack Thornell, A. P. photographer	Only left hand	None	Gov't. Ex. 6, R. 921, 924, 927-9.
Patrick Nolan, New Orleans Policeman	Only left cupped hand	Contact made in neck and shoulder region of Collins	R. 1033-4, 1047-8.
M. J. Gauthier, News reporter	Only left hand	Contact made with right cheek of Collins	R. 1293, 1299, 1308.

*Collins stated that his contemporaneous report that Marcello only used his right fist and made no contact was a full, complete and accurate account of the incident (R. 965). He then contradicted himself to say that Marcello first jabbed with his left and then attempted a right hand blow (R. 941, 955).

Carlos Marcello, his son, Joseph C. Marcello, and his brother, Joseph Marcello, Jr., testified that they did not know Collins was an F.B.I. agent, and that petitioner did not strike or attempt to strike Collins. On the contrary, petitioner merely raised his left hand in a non-threatening gesture to tell Collins "Oh man, let's go, get away from me." His brother and son then grabbed petitioner and wheeled him around (R. 1152-4, 1174-9, 1203-5).

Attorney Michel Maroun and Katherine Angel testified that on February 12, 1968, Collins stated to them in Shreveport, Louisiana, that the incident was an accident, that petitioner should not have been charged, and that he was not put in fear by Marcello (R. 1224-8, 1260-3). Maroun admitted that the next day he had dictated a memorandum of his conversation with Collins and that his secretary mistakenly dated it February 6th, 1968 (R. 1246-7). Joseph Paretto testified that Collins told him that Joseph Marcello, Jr., was the real troublemaker on September 30, 1966 (R. 1114-5). Roy Occhipinto testified that Collins told him that there was nothing to the incident and that nothing would come of the case (R. 1096). At the close of the Government's case and at the close of the entire case, motions for judgments of acquittal were denied (R. 1064, 1319).

C. The Government's Summation

In summation to the jury, over objections which were noted, accompanied by motions for mistrial, initially prosecutor Neff referred to the Maroun memorandum (not in evidence) of February 6th stating "the defense decided that they needed some kind of memorandum to impeach Agent Collins so they made up this phony memorandum" (R. 1353). Later he referred to the skunk in the case, the February 6th memorandum (R. 1355). In concluding argument, prosecutor Blask stated that he would tell the jury what really occurred (R. 1389), that the jury should not

be kidded by the defense, "they're not trying to be fair," it's the prosecution's "inference and contention that the memorandum or date of February 6th was manufactured, that defense witness, Mr. Maroun, "will sing upon request" (R. 1390, 1393-4). The Court's reaction to objections by defense counsel was: "I can't believe that this is so horrible. It says nothing about the defendant whatsoever." (R. 1354).

D. The Court's Charge and Sentence

The jury was instructed that petitioner was not required to touch Collins, know who he was, but merely to offer to touch him to establish guilt (R. 1401-5).

The District Court, although requested to, refused to charge that a willful attempt and intent to inflict violent or serious injury were required, or that *scienter* that Collins was an F.B.I. agent on the charge of assault or intimidation was essential (R. 1411-1413). The Court submitted both issues of assault or intimidation to the jury over objection (R. 1324-9, 1404). In the first trial herein, the Court ruled as a matter of law that intimidation was not established (R. 688). On September 12, 1968, petitioner was fined $5,000.00 and sentenced to two years imprisonment. The Court stated (R. 1508-10) in meting out this sentence that consideration was given to petitioner's brushes with the law, including mere arrests, indictments which resulted in dismissals, or findings of not guilty and his assertion of his constitutional rights before a Congressional Committee which resulted in a decision of the Fifth Circuit that he was not in contempt. *United States v. Marcello*, 196 F.2d 437 (5th Cir., 1952).

E. The Court of Appeals Opinion

The Court of Appeals ruled, contrary to the approach of the District Court and the Government's theory at the trial, that being struck would be considered the intimidation here-

in. The District Court's theory, however, was that petitioner's assertion that he was the boss could be construed by the jury as an intimidation. The double jeopardy and the free speech issues were avoided by the appellate court below. Recognizing that petitioner should have the right to withdraw a motion for a change of venue, the Court of Appeals concluded that withdrawal was properly denied because petitioner could not receive a fair trial in New Orleans. Neither knowledge that Collins was an F.B.I. agent nor that he was in performance of his official duties was considered necessary elements of the crime. Although the statute, 18 U.S.C. 111 speaks in terms of forcible assault and forcible intimidation, threats of simple offensive touching rather than threats of violent or serious injury were deemed sufficient to constitute the crime. The prosecution's summation accusing the defense of unfairness and fabrication was considered "legitimate forensic arguments." The immunity claim was rejected upon the basis that a state could not thwart federal prosecutions, and that immunity was inapplicable where, as here, no incriminating information was secured from petitioner. The District Court's comments upon the imposition of sentence were approved with the comment "There was nothing to indicate that the Judge was retrospectively punishing him (petitioner) for having successfully invoked Constitutional rights" or for criminal proceedings he ultimately won. The Court of Appeals opinion was rendered on February 18, 1970. Petition for rehearing was denied on April 1, 1970.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself * * *."

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * * *"

18 U.S.C. 111 provides:

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in Section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both."

The New York Penal Law provides:

> "SECTION 584 WITNESSES-IMMUNITY
>
> "In any criminal proceedings before any court, magistrate, or grand jury or upon any investigation before any joint committee for or relating to a violation of any of the provisions of this article, the court, magistrate or grand jury or the committee may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter.
>
> "SECTION 2447 WITNESSES-IMMUNITY
>
> "1. In any investigation or proceeding where by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order, and if but for this section, he would have been privileged to withhold the answer given, or the evidence produced, then immunity shall be conferred upon him as provided for herein.

"2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding.
* * *

"3. Competent authority in this section means:
* * *

"(c). The grand jury before which a person is called to answer questions or produce evidence when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence."

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The opinions below raise important constitutional procedural and substantive questions relating to free speech, double jeopardy, venue, immunity, proper professional conduct by prosecutors, proper scope of review by Court of Appeals adopting new theories at the appellate level, proper sentencing procedures as well as questions relating to the important substantive nature and elements of the crime herein. The decision below is in conflict with decisions of this Court and other Circuits.

1. The decision below is in conflict with *Ashe v. Swenson*, Sup. Ct. No. 57, Oct. 1969 Term, *Green v. United States*, 355 U.S. 184 (1957), *Street v. New York*, 394 U.S. 576 (1969), *Giordenello v. United States*, 357 U.S. 480 (1958) and *United States v. Leggett*, 312 F.2d 566 (4th Cir., 1962).

In the first trial herein, the District Judge removed intimidation from the case, thereby granting a directed verdict

of acquittal therein (R. 688). Nevertheless in violation of the double jeopardy prohibition of the Fifth Amendment to the Constitution (*Ashe v. Swenson*, Sup. Ct., No. 57, Oct. 1969 Term, *Green v. United States*, 355 U.S. 184 1960) and over objections (R. 1284) the intimidation issue was resubmitted to the jury at the second trial.

The submittal of the issue of intimidation by the District Court was based upon the contention that it might be impermissible for Marcello to say "I'm the boss of this town." (R. 1328). This statement by Marcello was protected by the First Amendment. Marcello's words threatened F.B.I. agent Collins with no physical or other violence, immediate or in the future. As in *Street v. New York*, 394 U.S. 576 (1969) petitioner's words could not constitutionally have been the basis for a conviction. And, as in *Street* and *Stromberg v. California*, 283 U.S. 359 (1931), the verdict against petitioner was a general one and it is impossible to say whether he was convicted for his words, constitutionally protected, or for his alleged assault, or both. Since it is impossible to say, the conviction can not stand. Review by this Court is therefore warranted.

The Court of Appeals sought to bypass and avoid the obvious constitutionally objectionable conviction herein by changing the intimidation theory advanced by the Government (R. 1348) and adopted by the District Court (R. 1328). The case was tried on the theory that Marcello's words might be an intimidation and that his alleged assault was an attempt to strike the F.B.I. agent. The theory of the prosecution in its opening remarks (R. 829-30) in request for instructions (R. 244-5), and in closing (R. 1348) as well as the instructions of the District Judges in both trials (R. 673-4, 1401) was not that Marcello struck Collins but that he threatened to strike him.[2]

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[2]Collins asserted at first that there was only an attempted right hand blow (Exhibit 7) and that he was only apprehensive of harm for a split second from petitioner's right hand (R. 955). Thereafter, he claimed it was a single left jab, followed by a right (R. 943, 971,

Collins could not have been in fear of a right hand blow when the immediate action of Marcello's brother prevented any such blow. Obviously, the prompt intervention of Marcello's brother likewise deprived petitioner of the present ability to assault Collins or interfere with his duties. *United States v. Barnaby*, 51 Fed. 20, 21 (D. Mont., 1892); *Guarro v. United States*, 237 F.2d 578, 580 (D. C. Cir., 1957); *Brundage v. United States*, 365 F.2d 616, 619 (10th Cir., 1966). Under these circumstances neither an assault nor a battery was committed.

The inconsistencies and conflict in the Government's presentation, the vacillations in Collins' various versions of the assault; Collins' adoption of Exhibit 7 as the complete and truthful account of the alleged assault, and the noninterference with Collins' duties as an agent, all deprived the prosecution's case of the substantiality necessary to uphold a guilty verdict. The Court of Appeals, however, went beyond the jury verdict, concluded that there was a battery (a punch in the face) and then used it as a predicate to find therefrom both an assault and an intimidation. It stated (App. B) "The punch in the face was a forcible assault * * *. And since this more than put Collins in fear of being struck, it constituted forcible intimidation as well." Contrary to *Giordenello v. United States*, 357 U.S. 480, 488 (1958) the appellate court below failed to strictly adhere to the theory upon which the case was tried at the district level. This not only conflicted with *Giordenello* but with the views of other circuits. *Wilson v. United States*, 250 F.2d 312, 325 (9th Cir., 1957); *United States v. Diogo*, 320 F.2d 898, 908 (2d Cir., 1963) and deprived petitioner of an opportunity at the trial to meet this theory belatedly advanced for the prosecution by the Court of Appeals. The unusual and unsanctioned change-

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976-8). He later claimed that there were several left jabs (R. 943-4). Government's Exhibit 6 and the news photographer who took the same confirms that Marcello's right hand was at his side and only his left hand was elevated (R. 927).

over in the theories of the case should not be permitted to stand or be approved.

Finally, we note that it was error to submit over objections, (R. 1324-29) the two offenses of assault and intimidation to the jury under a one count indictment, *United States v. Martinez-Gonzales*, 89 F.Supp. 62 (S.D., Calif., 1950); *United States v. Goodman*, 285 F. 2d 387 (5th Cir., 1961), cert. denied, 366 U.S. 930; *United States v. Leggett*, 312 F.2d 566 (4th Cir., 1962).

We therefore assert that the submittal of the intimidation issue by the District Court violated the double jeopardy prohibition and petitioner's constitutional rights. Its consideration by the Court of Appeals avoiding the constitutional issue likewise was in derogation of petitioner's constitutional right to notice of the issues to be met at the trial. Review by this Court is in order.

2. Petitioner's right under the Sixth Amendment of the Constitution to a jury trial in the state and district where the alleged crime was committed was likewise violated. Petitioner's counsel filed a motion for a change of venue on July 3, 1967. Prior to the argument of the motion on September 3, 1967 petitioner advised counsel that he did not desire a change of venue (R. 45). In open court on September 3, 1967 counsel clearly and repeatedly stated that he was not pressing the motion for a change of venue but only for a continuance (R. 59-61, 52). Nevertheless the Court orally directed that venue be changed on September 3, 1967.

Ten minutes after the oral argument defense counsel appeared in the Court's chambers and requested withdrawal of the oral change of venue order (R. 99) upon the ground that it was contrary to petitioner's wishes (R. 45). At the Court's suggestion, a written motion for reconsideration was filed one day later on September 14, 1967 together with petitioner's affidavit clearly stating his objection to a change of venue, and declaring that he had so advised his attorney prior to the argument. Petitioner unmis-

takeably affirmed that he did not waive his right to a trial in New Orleans (R. 45). Permission was specifically requested for leave to abandon the motion for a change of venue (R. 42-3). The motion was argued on September 22, 1967 and kept under advisement until March 1, 1968 when venue was changed to Laredo, Texas for the first trial herein. The second trial was conducted over objections (R. 332, 713) in Houston, Texas. The ruling of the District Court was that petitioner waived his Sixth Amendment right to a trial in New Orleans and that petitioner could only receive a fair trial in the Southern District of Texas. The Court of Appeals affirmed this ruling.

The right to apply for a change of venus is at the defendant's option and for his benefit. Change of venue may not be forced upon a defendant against his wishes. *Delaney v. United States*, 199 F.2d 115, 116 (1st Cir., 1952). The Courts below forced a change of venue at pretrial[3] upon petitioner allegedly to avoid an unfair trial. Their action was contrary to *Delaney v. United States* and *Patriarca v. United States*, 402 F.2d 314, 316 (1st Cir. 1968) cert. denied, 396 U.S. _____. In the latter case, defendant was permitted to waive his initial request for a change of venue.

The waiver of a constitutional right will not be presumed, *Johnson v. Zerbst*, 304 U.S. 458 (1937) and the facts establishing waiver must be clearly established. *United States v. Smith*, 392 F.2d 302 (4th Cir., 1968); *Sullins v. United States*, 389 F.2d 985 (10th Cir., 1968).

A choice made by counsel not participated in by the accused is not necessarily binding upon a defendant. *Fay v. Noia*, 372 U.S. 391, 439 (1963). Mere silence by petitioner

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[3]Compare *Blumenthal v. United States*, 284 F.2d 46, 51 (8th Cir., 1960, cert. denied, 365 U.S. 812) where it was held that a determination of fairness could only be made at the *voir dire* examination of prospective jurors.

was erroneously interpreted below as a waiver *Miranda v. United States,* 384 U.S. 475 (1966); *Carney v. Cochran,* 369 U.S. 506, 516 (1962).

Here at the time of oral argument before District Judge Hebee, it was made abundantly clear that the motion for a change of venue was not being pressed[4] and that only a continuance was requested.

The District Court was advised that no place of transfer could be named. In this situation petitioner should not have been required against his will to have a trial elsewhere. In *Delaney v. United States, supra,* the Court was advised, as here, that there was no assurance that a trial free from public prejudice could be obtained by a transfer. There, too, the Court was advised, as petitioner's counsel stated here, that postponement until after election would give appellant a fairer trial. The Court ruled that the law required such postponement.

Stevens v. Marks, 383 U.S. 234, 243, 244 (1966), involved a written waiver of immunity and of Fifth Amendment rights signed by a police officer without the advice of counsel. Thereafter, he withdrew the waiver and claimed his constitutional rights under the Fifth Amendment. Justice Douglas speaking for the Court said that no justification could be found for not permitting the right to withdraw the waiver and further:

> "We hold that petitioner's effort to withdraw the waiver was effective *** petitioner could properly stand on his privilege and refuse to answer potentially incriminating questions."

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[4]Compare the accepted principle that failure to press issues in appellate arguments constitutes an abandonment of the same. *United States v. Chicago B & Q R. Co.,* 82 F.2d 131, (8th Cir., 1936) cert. denied, 298 U.S. 689; *Pratti v. United States,* 389 F.2d 660 (9th Cir., 1968); 5 *Am. Jur.* 2d, Sec. 698. No authority can be cited to contradict the proposition that intentionally not pressing a point and so advising the Court is an abandonment of such point. Here, petitioner's counsel effectively abandoned his motion for a change of venue.

The *Stevens* case is particularly applicable here. The motion for a change of venue was not *per se* a waiver. Even if it were, no justification existed for denial of permission to withdraw such motion and to permit the petitioner to stand on his constitutional right. The instant case is stronger than *Stevens*, as here petitioner never personally stated on the record that he desired to waive his rights.[5] On the contrary, he promptly advised the Court before any transfer that he desired no changed place of trial. Under these circumstances, it was error to force a change of venue upon petitioner. The decision below is in conflict with the *Stevens* case and with *Patriarca v. United States, supra.* It should be reviewed by this Court.

3(A). Under the District Court's instructions petitioner has been convicted and sentenced to two years imprisonment and fined $5,000.00 for threatening to touch a person, who unbeknown to him, was an F.B.I. agent posing as a deplaning airplane passenger. This conviction flies in the face of the statute's history and intent. It is contrary to accepted criminal standards governing *scienter*, and in conflict with the views of this Court in *Pettibone v. United States*, 148 U.S. 197 (1892); *Morissette v. United States*, 342 U.S. 246, 270 (1951); and the opinions of the Sixth Circuit, *United States v. Rybicki*, 403 F.2d 599 (6th Cir., 1968); *Sparks v. United States*, 90 F.2d 61 (6th Cir., 1937); the Eighth Circuit, *Walker v. United States*, 93 F.2d 792 (8th Cir., 1938) and the practice in the District of Columbia Circuit. (See: Criminal Jury Instructions, D.C. Bar Association p. 34; *Mitchell v. United States*, 394 F.2d 767, 772, D.C. Cir., 1968).

Assault upon a federal officer is an aggravated offense and a felony. The basis for making it an aggravated crime

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[5]Waiver of the constitutional right to counsel should appear on the record. *Glasser v. United States*, 315 U.S. 60, 71-72 (1941). Waiving the constitutional right of venue should likewise appear on the record.

is the fact that the offender knowingly interferes with an officer of the government. 1 *Wharton's Criminal Law and Procedure,* 10th Ed., p. 723. The jury was instructed that petitioner was not required to touch Collins, know who he was, but merely to offer to touch him to establish guilt (R. 1401-5). The view that *scienter* is not necessary as to the official character of the person assaulted has the support of several circuits. *United States v. Lombardozzi,* 335 F.2d 414, (2d Cir., 1964), cert. denied, 379 U.S. 914, *United States v. Wallace,* 368 F.2d 537 (4th Cir., 1966), cert. denied, 386 U.S. 976; *Bennett v. United States,* 285 F.2d 567 (5th Cir., 1960); *McEwen v. United States,* 390 F.2d 47 (9th Cir., 1968). None of these cases, however, involved a situation where the federal official assumed another identity. All were clear cases where the defendant knew the victim was a federal officer. *Pipes v. United States,* 399 F.2d at 476 (5th Cir., 1968).

The conflict in circuits on this important issue is acknowledged in *United States v. Chunn,* 347 F.2d 717, 721 (4th Cir., 1965) where it was stated:

> "Concededly, there is a wide variance and lack of unanimity among the decisions as to whether *scienter* should be alleged and/or proved."

Mitchell v. United States, 394 F.2d 767, 772, (D.C. Cir., 1968) takes cognizance of the conflict in these words:

> "Although several courts havae held that knowledge of the victim's federal employment is an element of a § 111 offense, there is a discernible trend of decisions to the contrary."

The Second Circuit has indicated that its *Lombardozzi* decision, *supra,* will not be extended to arrest cases, *United States v. Heliczer,* 373 F.2d 241 (2d Cir., 1967) and the Fifth Circuit reached the result below over a vigorous dissent in *Pipes v. United States,* 399 F.2d 471, 473 (5th Cir., 1968) which noted:

> "It has long been the settled law of this circuit, rendered in head-on decisions that in a prosecution

> under 18 U.S.C.A. § 111 it must be proved that the defendant had knowledge that the victim of his wrongful conduct was a federal officer."

And as the dissent in *Pipes, supra,* at 476 observes, in accordance with the requirements of *Pettibone v. United States, supra,* and *Morissette v. United States, supra,* it has always been held that knowledge is a necessary element in related federal crimes of influencing and intimidating a witness or officer (18 U.S.C. 1503); offering to bribe a federal officer (18 U.S.C. 201); and interfering with an officer executing a search warrant (18 U.S.C. 2231).

The determination as to whether knowledge should be eliminated as an element of 18 U.S.C. 111 has a far-reaching impact and should be decided by this Court.

(B). From earliest times a criminal assault has required an intent by a defendant to cause a violent injury.

Hawkins, 1 P.C. 110, defines an assault as "an attempt or offer with force and violence to do corporal hurt to another".

1 *Wharton, Criminal Law and Procedure,* Sec. 603 (10th Ed.), states:

> "An assault is an apparent attempt by *violence* to do corporal hurt to another."

6 *Corpus Juris Secundum,* p. 913 says:

> "An 'assault' may be defined as an unlawful attempt coupled with the present ability, to commit a *violent injury* on the person of another."

United States v. Barnaby, 51 Fed. 20, 21 (D. Montana, 1892), declares:

> "An 'assault' is generally defined to be an unlawful attempt coupled with a present ability to commit a *violent injury* upon the person of another."

See also: *Brundage v. United States,* 365 F.2d 616, 619 (10th Cir., 1966); *Chapman v. State,* 78 Ala. 463 (1885); *People v. Doud,* 223 Mich. 120, 193 N.W. 884 (1923); *Jackson v. Commonwealth,* 247 S.W. 2d 52 (Ky., 1952).

18 U.S.C. 111 forbids an assault which alone imports force and violence but also adds the requirement of a "forcible" assault. It was intended to protect Government agents engaged in their duties from violent or serious injuries and not from open handed slaps on the wrist. Every reported case under 18 U.S.C. 111 involved instances of attempted forcible assaults seriously endangering the victim[6] and interfering with his duties.[7]

The legislative history of 18 U.S.C. 111 reflects the concern of Congress that only *"forcible"* assaults be punished. In 1905 (33 Stat. 1265) and again in 1909 (35 Stat. 1100) Congress prohibited *"forcible"* assaults upon employees of the Bureau of Animal Industry. The legislation was prompted by "two vicious, deadly and unprovoked assaults" (*House Report* 4200, 58th Congress 3rd Session, p. 5) upon such employees. This statute subsequently became 18 U.S. C. 118 (1940 Ed.) which was consolidated with 18 U.S.C. 254 (1940 Ed.) to become 18 U.S.C. 111 (*House Report* 304, 80th Congress, 1st Session).

Section 2 of the Act of May 18, 1934 (48 Stat. 780) prohibited mere assaults and forcible resistance or intimidation of federal officials (*House Report* 1455, 73rd Congress, 2d Session, *Senate Report* 535, 73rd Congress, 2d Session). This section became 18 U.S.C. 254 (1940 Ed.).

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[6]All reported cases show that force was used, *Long v. United States*, 199 F.2d 717 (4th Cir., 1954). Thus, in *Bennett v. United States*, 285 F.2d 567 (5th Cir., 1960), *Hall v. United States*, 235 F.2d 248 (5th Cir., 1956), and *McEwen v. United States*, 390 F.2d 47 (9th Cir., 1968), guns were utilized in the assault. This is the only case where a conviction resulted even though there was no interference with the Government agent's duties (R. 972). We submit that the statute contemplated a forcible assault which did interfere with an agent's duties.

[7]Collins testified that Marcello did not interfere with his duties (R. 972).

When Congress consolidated 18 U.S.C. 118 (1940 Ed.) and 18 U.S.C. 254 (1940 Ed.) it had the language of *forcible* assault in the former and a mere assault in the latter section. In enacting 18 U.S.C. 111 Congress chose to retain the requirement of a *forcible* assault and not a mere assault.

Here the Court's charge read out of the statute the word "forcibly". Here, in a case where there was a conflict in the Government's evidence as to whether Collins was even touched and in a case where there was a conflict as to Marcello's intentions, the trial judge instructed the jury that the test of an assault under 18 U.S.C. 111 was whether Collins reasonably believed that some non-severe injury or touching might be inflicted (R. 1402). 18 U.S.C. 111 is a statute frequently invoked. Its proper interpretation in the light of its history and applicable legal principles and the conflict in circuits require Supreme Court review.

4. The conduct of attorneys during trial has become of increasing concern to the bench, the bar and the public. Repeated warnings by appellate courts have failed to confine attorneys to proper restraint and decorum in closing arguments. Mr. Chief Justice Berger as a Circuit Judge observed in *Taylor v. United States*, 413 F.2d 1095 (D.C. Cir., 1969), "we have all become too tolerant of violations of canons and customs." The frequency of these violations and of unprofessional conduct by attorneys meriting discipline has been recently noted in *Olenin v. Curtin & Johnson, Inc.*, ____F.2d____(D.C. Cir., Nov. 27, 1968), and in *United States v. Jones*, ____F.2d____(D.C. Cir., Jan. 27, 1970). The instant case presents a case of highly prejudicial and improper prosecutorial conduct in a closely contested case which was approved by the Court below contrary to decisions in other circuits. *Olenin v. Curtin & Johnson, Inc., supra; Harris v. United States*, 402 F.2d 656 (D.C. Cir., 1968); *Patriarca v. United States*, 402 F.2d 314 (1st Cir., 1968) cert. denied 396 U.S.____.

In closing argument prosecutor Neff referred to a meeting of February 12, 1968, between defense witness Michel

Maroun and Collins. Maroun, a member of the Louisiana Bar (who represented Marcello but did not act as attorney in the trial herein) and Katherine Angel had testified that at this meeting Collins had admitted that the alleged assault was an accident, that he was not placed in fear by Marcello and that Marcello should not have been charged. Maroun stated that he dictated a written memorandum of the event a day later but that his secretary incorrectly dated it February 6th (R. 1247). The memorandum was not introduced in evidence. Prosecutor Neff said (R. 1353):

> "The defense decided that they needed some kind of memorandum to impeach Agent Collins so they made up this phony memorandum."

Objecton was made and petitioner moved for a mistrial (R. 1353, 1408). The District Court observed: "I can't believe that this is so horrible. It says nothing about the defendant whatsoever." (R. 1354). Mr. Neff then continued, stating that God only knows when Katherine Angel went back and inserted the date February 12th on her calendar[8] to show the meeting with Collins (R. 1355), that the skunk in the case was the February 6th memorandum of an interview that had never taken place (R. 1355). Prosecutor Blask advised the jury he would tell them what really occurred, and that the defense was not trying to be fair (R. 1390). Appropriate objection was noted and overruled (R. 1390, 1408). He concluded (R. 1393-5):

> "Don't you know a lawyer representing this defendant in a criminal case would have been sure about that date? It was a week earlier and it is our inference and our contention that it was manufactured. The only thing that I can offer about Mr. Maroun and what he had to say is that he will sing upon request.
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[8]Katherine Angel testified that the date of her meeting with Collins February 12, 1968, appears on her personal calendar (R. 1272-3).

> "I hope that I can convey it to you as I feel it, that this is insult to your intelligence, this whole defense."

The closing jury argument of the prosecution was reprehensible, improper, unethical and prejudicial. The United States Attorney is dedicated to fairness and equal justice to all. His duty is not to win cases but to see that justice is achieved. *Berger v. United States,* 295 U.S. 78, 88 (1934). Here the prosecution was not concerned with justice to Marcello but with obtaining a conviction. The closing arguments were highly improper, *firstly* because they unjustly and prejudicially charged the defense and defense witnesses with fabrication and the manufacture of evidence.

Charging an attorney for a party with unethical misconduct is prejudicial error. *Atlantic Coast Line R.R. Co. v. Coxwell,* 91 S.E. 2d 135, 93 Ga. App. 159 (1955); *O'Gallagher v. Finkel,* 129 N.E. 2d 345, 7 Ill. App. 2d 296 (1955); *Tri State Transit Co. v. Westbrook,* 180 S.W. 2d 121, 207 Ark. 270 (1944).

In *Jones v. State,* 205 S.W. 2d 590, 151 Tex. Cr. App. 115 (1947), the Court declared:

> "What defense counsel says and does is as if the defendant himself were the actor."

An allegation that the defense was fabricated was held improper. The claim of fabrication by witnesses is equally objectionable. *5 Busch, Law and Tactics in Jury Trials,* (1963) Sec. 664.

Secondly, the prosecution improperly commented on a memorandum or document which was not in evidence. As noted in *Dunn v. United States,* 307 F.2d 883 (5th Cir., 1962):

> "It is improper for counsel to express his personal opinion or to state facts of his own knowledge, not in evidence, and not part of the evidence to be presented, or to make unwarranted insinuations calculated to prejudice the defendant. * * * Opinions of prosecutors or defense counsel are not issues to be presented to the jury."

See *Greenberg v. United States*, 280 F.2d 472, 474-5 (1st Cir., 1960), where it was stated that such conduct is contrary to Canon 15 of the American Bar Association Canons of Professional Ethics; *Reichert v. United States*, 359 F.2d 278 (D.C. Cir., 1966); *Johnson v. United States*, 347 F.2d 803 (D.C. Cir., 1965).

United States v. Grossman, 400 F.2d 951 (4th Cir., 1968), emphasizes the impropriety of utilizing non-record material in closing argument.

Here, the thrust of the repeated charges of a "phony memorandum" and of "manufactured evidence" and the accusation that Maroun "will sing upon request" was a reference to material not in evidence. In the context made by the prosecution that the defense was not fair, that defense lawyers were not revealing what really occurred and that they were fabricating evidence, the Government effectively destroyed fairness and equal justice in the trial herein.

Thirdly, it was improper for the prosecutors to express their personal opinion. The challenged statements of the prosecution noted above clearly expressed to the jury the prosecution's belief that petitioner was guilty. This was highly prejudicial and reprehensible.

The issue of guilt here was highly contested. There was a previous hung jury and mistrial. In the first trial, the prosecutor did not indulge in the unethical and improper closing argument, here the subject of complaint. It cannot, therefore, be said that the unjustified remarks of the prosecutors did not weigh heavily with the jury below.

Review should be granted herein to resolve the propriety of the prosecutors' conduct and to establish the appropriateness of the guidelines fixed in other circuits.

5. The Court of Appeals refused to recognize immunity granted by a state and would read the New York statute narrowly confining it only to cases where incriminating evidence is revealed. The latter issue may be controlled by

Piccirillo v. New York, No. 1249, cert. granted March 2, 1970. The decision below disregards the precepts of *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), *Counselman v. Hitchcock*, 142 U.S. 547, 586 (1891), creates a conflict with *Frank v. United States*, 347 F.2d 486 (D.C. Cir. 1965), cert. denied, 382 U.S. 923 and throws immunity practices and procedures into confusion. In the light of the increasing invocation and utilization of immunity statutes, the problem presented herein should be settled definitely by this Court.

After the alleged assault herein and prior to the trial, petitioner was called before a grand jury in Queens, New York. After claiming self-incrimination on November 4, 1966, and again on May 3, 1967, petitioner was granted complete immunity by the grand jury from any prosecution and *relieved from any penalty on account of any transaction concerning which he gave testimony* (R. 24, 269-290, 199). This was pursuant to the New York Penal Law sections 584 and 2447.

Prior to his grand jury appearance petitioner objected to testifying because he was under the instant assault indictment. He then obtained a ruling in New York by the Queens County Supreme Court that he was granted immunity in Louisiana as well as in New York pursuant to *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) (R. 24, 272-277).

To be valid, an immunity statute "must afford absolute immunity," *Counselman v. Hitchcock*, 142 U.S. 547, 586 (1891). The grant of immunity by a state precludes federal prosecution, *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

As noted in *United States v. Niarchos*, 125 F. Supp. 214 (Dist. of Col., 1954), the language of the immunity provisions are clear and the "protection of immunity is to prosecution and not to indictment. The immunity provision would be ineffective if it did not apply to indictments al-

ready returned and in which the witness was named as a defendant." See also: *Frank v. United States*, 347 F.2d 486 (D.C. Cir., 1965), cert. denied, 382 U.S. 923 and 55 *Georgetown Law Review* 656 (March, 1967).

The New York immunity statute precludes use of a person's testimony against him and also grants immunity from prosecution for any matter which was the subject of his testimony.

While petitioner was under this assault indictment, he was compelled to testify in New York pursuant to a broad grant of immunity from prosecution for any matter concerning which he testified. He did testify relative to the alleged assault herein in a very limited way as found by the District Court below (R. 200). However, if the immunity statute means what it says, and if persons under indictment are continued to be called before grand juries, then petitioner was granted complete immunity for any matter concerning which he testified, including this alleged assault. He was, therefore, granted immunity from this prosecution and such immunity should be respected.

6. The sentencing of petitioner violated his constitutional rights. On this record, petitioner was given the unusually severe sentence of two years imprisonment and a fine of $5,000.00, although he inflicted no bodily harm and interfered in no manner with an agent whose identity he did not know. The District Court acknowledged that in meting out this sentence weight was accorded to his "brushes with the law," indictments which resulted in acquittals,[9] and assertion of his Fifth Amendment privilege before a Congressional Committee. See *United States v. Marcello*, 196 F.2d 437 (5th Cir., 1952).

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[9]Marcello was acquitted in 1963 on a conspiracy prosecution (E. D. La., No. 28,365) and on a bribery charge in 1965 (E.D. La., No. 29,711). Two other indictments filed in 1961 for perjury (E.D. La., No. 28,366) and illegal reentry (E.D. La., No. 28,233) were dismissed.

The Court stated (R. 1499-1500, 1508-10):

"THE COURT: The matters that this Court has taken into consideration are all matters relating to which are factual. In other words, there are some prior convictions, as you know.

"MR. WASSERMAN: Yes, sir.

"THE COURT: And some prior trials that resulted in not guilty verdicts, and a matter relating to deportation that went up to the United States Supreme Court and is now pending. Those matters, I have taken into consideration and that's all.

* * *

"THE COURT: As you know, this particular crime carries with it a maximum sentence of three years in the penitentiary and a maximum fine of $5,000.00. It is true that in particular, in connection with the incident that brought about the event that caused the indictment in the later trial of Mr. Marcello, *it was not what the Court would determine an aggravated type of incident.* However, it is likewise true that Mr. Marcello has in the past, throughout his life, been convicted of some crimes—two, I believe—three, I believe, and one of them was set aside. I think it would actually—

"MR. WASSERMAN: Two.

"THE COURT: In connection with one of which I believe he received a pardon from Governor O. K. Allen in Louisiana back in 1936 or '38. His activities have been such that he has been under suspicions and accusations from time to time resulting, as we have already discussed, in a trial. *Well, first, an indictment for failing to answer questions—contempt proceedings in front of the United States Senate for failure to answer questions before the United States Senate Committee, and then a trial, a not guilty, then an indictment for perjury * * * — alleged violation of bribing the jury, for which he was found not guilty, also.*

> *"But all of these matters, of course, indicate to the Court that Mr. Marcello has had some connection with and brushes with violations of the law.* The letters all indicate that Mr. Marcello, at least today, is a man of substance, a man who was charitable to the charities and to the poor people, but all in all the Court is of the opinion that a fair trial was afforded Mr. Marcello on this incident and an unprejudiced and unbiased jury found him guilty. *Even though the events were not of an aggravated type, they found him guilty.*
>
> "And, therefore, the Court is going to sentence Mr. Marcello to a fine of $5,000 and to two years in the penitentiary." (Emphasis supplied).

Appellate courts normally do not review sentences. They have such authority, however, in the exercise of their supervisory powers. *Yates v. United States*, 356 U.S. 363, 366 (1958). A defendant should not be punished by a heavy sentence because of exercise of his constitutional rights. *United States v. Wiley*, 278 F.2d 500, 504 (7th Cir., 1960). The practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment was condemned by the Supreme Court in *Slochower v. Board of Education*, 350 U.S. 551, 557 (1956). *Verdugo v. United States*, 402 F.2d 599 (9th Cir., 1968), remanded a case for resentencing where the trial judge improperly relied upon evidence seized contrary to the Fourth Amendment in determining the sentence imposed.

We submit that this Court should intervene to prevent punishment based upon "brushes with the law" and the exercise of constitutional rights.

CONCLUSION

For the reasons set forth herein, we request that a writ of certiorari issue.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America
v.
Carlos MARCELLO.
Crim. A. No. 30888.

United States District Court
E. D. Louisiana,
New Orleans Division.
March 1, 1968.

Prosecution for forcibly assaulting and intimidating an FBI agent engaged in performance of his official duties. The defendant's motion for change of venue was granted. The defendant filed motion to reconsider the order directing change of venue. The District Court, Heebe, J., exercised discretion to refuse to vacate order granting change of venue.

Motion to reconsider denied and cause transferred to United States District Court for Southern District of Texas.

1. **Criminal Law 126(1)**

The rule providing for change of venue for prejudice in the district is merely a procedural device designed to preserve and protect accused's constitutional right to fair and impartial trial. Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

2. **Criminal Law 126(1)**

Courts must be ever sensitive and finely attuned to prejudice inherent in adverse publicity and must be vigilant in correcting abuses.

3. **Criminal Law 1165(1)**

A conviction obtained in atmosphere contaminated by adverse publicity will not stand.

4. **Criminal Law 121**

A motion for change of venue is directed to sound discretion of court. Fed. Rules Crim. Proc. rule 21(a), 18 U.S.C.A.

5. Criminal Law 126(1)

The rule providing for change of venue for prejudice in the district is preventative and anticipatory and is not solely curative as is a post-conviction constitutional attack. Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

6. Criminal Law 126(1)

It is the well-grounded fear that defendant will not receive a fair and impartial trial which warrants application of the rule providing for change of venue for prejudice in the district. Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

7. Criminal Law 126(1)

Venue should be changed where there is reasonable likelihood that prejudicial news prior to trial will prevent fair trial. Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

8. Criminal Law 126(1), 132

Venue may be changed whenever the court is satisfied that defendant cannot obtain fair and impartial trial in district; the motion may be granted prior to voir dire as well as at the voir dire. Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

9. Criminal Law 132

Avalanche of adverse publicity may clearly raise a presumption of prejudice so that it is unnecessary to postpone determination of change of venue until the voir dire. Fed. Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

10. Criminal Law 135

As respects change of venue, when pretrial publicity is great, court may disregard prospective jurors' assurances of impartiality. Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

11. Criminal Law 137

It is quite proper to make determination as to whether venue should be changed for prejudice in the district solely on basis of pretrial publicity. Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

12. Criminal Law 135

As respects change of venue, determination of whether prejudice prevails can be made only upon consideration of totality of circumstances of each particular case. Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

13. Criminal Law 126(1)

The nefarious publicity which defendant continuously attracted for many years entitled him to change of venue as he requested. Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

14. Criminal Law 145

Record failed to show that defendant abandoned his motion for change of venue at oral argument. Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

15. Criminal Law 591

Where adverse publicity is of continuous nature, nothing is gained by a continuance and it is improper to grant continuance in such a situation.

16. Criminal Law 145

The constitutional right of defendant to be tried in state and district where alleged crime was committed is a personal privilege which may be waived by accused. U.S.C.A.Const. art. 3, § 2, cl. 3; Amend. 6.

17. Criminal Law 145

The right of defendant to be tried in state and district where alleged crime was committed is clearly waived when the defendant seeks change of venue. U.S.C.A. Const. art. 3, § 2, cl. 3; Amend. 6; Fed. Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

18. Criminal Law 145

When motion for change of venue is granted, waiver of defendant's constitutional right to be tried in state and district where alleged crime was committed becomes effective even though written order implementing change has not yet been entered. U.S.C.A.Const. art. 3, § 2, cl. 3; Amend. 6; Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

19. Criminal Law 139

Defendant has no right to insist on transfer to any particular district. Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

20. Criminal Law 145

Waiver of constitutional right of defendant to be tried in state and district where alleged crime was committed requires defendant to know and fully understand nature of his right before waiver will be effective. U.S.C.A.Const. art. 3, § 2, cl. 3; Amend. 6; Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

21. Criminal Law 145

Record disclosed that defendant moving for change of venue was personally aware of his right to be tried in state and district where alleged crime was committed. U.S.C.A. Const. art. 3, § 2, cl. 3; Amend. 6; Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

22. Criminal Law 145

Choice of defendant's attorneys to move for change of venue would be binding on defendant as effective waiver of his right to be tried in state and district where alleged crime was committed. U.S.C.A.Const. art. 3, § 2, cl. 3; Amend. 6; Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

23. Criminal Law 145

Defendant's assertion on his request to withdraw order granting change of venue that he preferred continuance to a change of venue could not detract from voluntary or intentional nature of waiver of his right to be tried in state or district where alleged crime was committed in view of fact that defendant did forcefully urge his motion for change of venue. U.S.C.A.Const. art. 3, § 2, cl. 3; Amend. 6; Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

24. Criminal Law 304(16)

Court could take judicial notice of records of other cases in district wherein defendant moved for change of venue.

25. Criminal Law 145

Defendant's knowing acquiescence to his attorneys' argument for change of venue constituted intentional and voluntary relinquishment of his right to be tried in state and district where alleged crime was committed. U.S.C.A. Const. art. 3, § 2, cl. 3; Amend. 6; Fed.Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

26. Criminal Law 140

Generally a request to vacate a request once entered is directed, in absence of error, to court's discretion.

27. Criminal Law 140

Court exercised its discretion to refuse to grant defendant's motion to vacate order granting change of venue. Fed. Rules Crim.Proc. rule 21(a), 18 U.S.C.A.

28. Criminal Law 139

When a court grants motion for change of venue, it has authority to transfer case to a district of its own choosing. Fed.Rules Crim.Proc. rule 21 (a), 18 U.S.C.A.

Louis C. LaCour, U. S. Atty., New Orleans, La., Owen Neff, Joseph J. Tafe, Attys., U. S. Dept. of Justice, Washington, D. C., for the Government.

Jack Wasserman, Wasserman & Carliner, Washington, D. C., Michel A. Maroun, Shreveport, La., G. Wray Gill, New Orleans, La., for defendant.

HEEBE, District Judge:

We are faced with a very unusual problem in this case. The events leading to this unique situation, though, are quite simple. On June 1, 1967, a one-count indictment, alleging that the defendant, in violation of 18 U.S.C. § 111, forcibly assaulted and intimidated an FBI agent engaged in the performance of his official duties, was filed against the defendant, Carlos Marcello. Defendant pled not guilty at his arraignment on June 14, 1967, and was given thirty days

in which to file pleadings. On July 3, 1967, defendant filed a motion for a change of venue along with ten other motions.[1] All eleven motions were originally scheduled for oral argument on August 4, 1967, but were continued to September 13, 1967, in order to accommodate defense counsel. At that time the motion for change of venue was heard first at the Court's suggestion. It was readily apparent to the Court from the memorandum and exhibits submitted in support of the motion for change of venue, from the oral argument thereon, and from the exhibits offered into evidence at the hearing, that extensive prejudicial publicity existed which would deprive the defendant of a fair and impartial trial in this district. Consequently, the motion for a change of venue was granted, and the hearing terminated.

Not more than ten minutes after the conclusion of the hearing, defense counsel entered the Court's chambers and, to the complete surprise of the Court, made an oral *ex parte* request for the Court to withdraw its order granting the change of venue which had just been entered. It was somewhat astonishing to the Court, to say the least, for the defendant to move for a change of venue, to argue the mo-

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[1] The other motions were entitled: Motion To Dismiss for Failure To State an Offense; Motion To Dismiss for Failure To Present Evidence to Warrant Indictment; Motion To Dismiss Indictment Upon the Ground That It Was Procured by Improper Conduct of Prosecuting Officials Herein; Motion To Dismiss Upon the Basis of Immunity; Motion of Defendant To Inspect the Grand Jury Minutes of Testimony of Patrick J. Collins, Jr.; Motion To Inspect All Evidence in the Possession of the Government Favorable to the Defendant; Motion Challenging Grand Jury Array and To Dismiss Indictment Upon Such Challenge; Motion of Defendant for a Bill of Particulars; Motion for Production of Documents and Tangible Evidence for Inspection and Copying Under Rule 16; Motion of Defendant to Suppress Evidence Illegally Obtained. The motion for change of venue was joined with a motion for a continuance and was entitled: Motion for Continuance and for a Change of Venue.

tion, and after the motion was granted, to urge the Court to withdraw its order granting the defendant's motion. Nevertheless, the Court suggested that the defendant file a written motion requesting the desired action together with a memorandum in support thereof. On September 14, 1967, the defendant filed the present motion entitled "Motion to Reconsider Order Directing Change of Venue" which was followed by a supporting memorandum. This motion came on for hearing on September 22, 1967, and because of the unique problem it posed, was taken under submission after oral argument.

I.

[1-3] Before turning to a consideration of the motion to reconsider our previous order granting the change of venue, we wish to briefly consider change of venue in general and the factors which prompted us to grant defendant's initial motion. A motion for a change of venue involves the interpretation and application of Federal Rule of Criminal Procedure 21(a), Title 18 U.S.C., which provides for a change of venue upon the motion of defendant "if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he *cannot obtain a fair and impartial trial* at any place fixed by law for holding court in that district." (emphasis added) This rule is merely a procedural device designed to preserve and protect the accused's constitutional right to a fair and impartial trial. A fair and impartial trial is perhaps most often endangered by prejudicial publicity. Recent Supreme Court decisions make it clear that the courts must be ever sensitive and finely attuned to the prejudice inherent in adverse publicity and must be vigilant in correcting abuses; it is certain that a conviction obtained in an atmosphere contaminated by such publicity will not stand. Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966); Estes v. State of Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); Rideau v. State of Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.

2d 663 (1963); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959). It is because the defendant should not be required to stand trial amidst an atmosphere tainted with prejudice and thus be dependent upon an appeal to secure his rights that Rule 21(a) offers its protection to him. Although not at issue here, there are two aspects of Rule 21(a) which we think merit comment.

[4-7] The rule adopts the exact phraseology ("fair and impartial trial") which has evolved as the constitutional guarantee provided by the due process clause and by the Sixth Amendment right to trial by an impartial jury. It might thus appear that the invocation of the rule is to be measured by the same standards applicable to the constitutional guarantee; that is, a change of venue under Rule 21(a) might seem to require the same showing which is necessary to reverse a conviction on the ground that the defendant's right to a fair and impartial trial was violated. This, in turn, coupled with the use of the word "cannot," might be construed as meaning that a change of venue could be granted *only* when it could be said that a conviction, if obtained, *must* be reversed on appeal. A strict literal interpretation of Rule 21(a) may support such a view. If so, perhaps a substitute in the rule for the word "cannot" could be suggested because the rule, by its very nature, does not require this nor have the courts required it. It is well to note that the restrictive connotations of the word "cannot" are ameliorated in the rule by the use of the word "satisfied." This may well be the statutory basis for the well-settled rule that a motion for a change of venue is directed to the sound discretion of the court. Bearden v. United States, 320 F. 2d 99, 101 (5th Cir. 1963); Greenhill v. United States, 298 F.2d 405, 411 (5th Cir. 1962); Shockley v. United States, 166 F.2d 704, 709 (9th Cir. 1948); Kersten v. United States, 161 F.2d 337 (10th Cir. 1947). Yet it could hardly be suggested that the vital constitutional right

to a fair and impartial trial hinges upon the discretion of a trial judge. This should demonstrably illustrate the difference. The rule is preventative. It is anticipatory. It is not solely curative as is a post-conviction constitutional attack. Thus, the rule evokes foresight, always a more precious gift than hindsight, and for this reason the same certainty which warrants the reversal of a conviction will not always accompany the change of venue. Succinctly, then, it is the well-grounded *fear* that the defendant will not receive a fair and impartial trial which warrants the application of the rule. Singer v. United States, 380 U.S. 24, 35, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965). As the Supreme Court recently stated in Sheppard v. Maxwell, supra, venue should be changed "where there is a *reasonable likelihood that* prejudicial news prior to trial will prevent a fair trial." (emphasis added) 384 U.S. at 363, 86 S.Ct. at 1522. The many cases which we have examined indicate that this is the federal practice. See United States v. Kline, 205 F.Supp. 637, 639-640 (D. Minn.1962), for example, where this practice was explicitly recognized. It is thus clear that the meaning of Rule 21(a) which a very strict literal interpretation of the statute might suggest contravenes both the nature and the obvious intent of the rule. Further, we have found no indication that any court has ever accepted such a thwarted view of the rule. In fact, we have paused to consider this point only because the bare wording of the rule raises the possibility.

[8-11] Before turning to the facts of this case, there is another facet of change of venue which we think warrants discussion. A casual reading of some of the cases seems to indicate that the determination of whether or not to grant a change of venue is to be made only at the *voir dire*. Blumenfield v. United States, 284 F.2d 46, 51 (8th Cir. 1960); United States v. Hoffa, 156 F. Supp. 495, 500 (S.D.N.Y. 1957); United States v. Malinsky, 20 F.R.D. 300, 303 (S. D.N.Y. 1957); United States v. Dioguardi, 20 F.R.D. 33, 36 (S.D.N.Y. 1956); United States v. Eisler, 75 F. Supp. 634, 639 (D.D.C. 1947). The *voir dire* is definitely one possible time at which to make the determination. It is,

however, certainly not required that the determination be made at that time. The rule itself provides that the transfer may be made when the court is "satisfied * * *." Thus, by the very terms of the rule, venue may be changed *whenever* the court is "satisfied," whether this be at some time prior to the *vior dire*, at the *voir dire*, or at the trial itself. Indeed, in at least three cases, the motion for change of venue was granted prior to the *voir dire*. United States v. Rossiter, 25 F.R.D. 258 (D. Puerto Rico 1960); United States v. Parr, 17 F.R.D. 512 (S.D. Tex. 1955); United States v. Florio, 13 F.R.D. 296 (S.D. N.Y. 1952). Loose statements found in cases such as those cited above that the determination of whether or not to grant a change of venue is to be made at the *voir dire* certainly do not establish any rule of law that the *voir dire* is the only time at which the determination may be made. They only represent the proposition that in many cases the court will not be *satisfied* until an examination of the jurors upon the *voir dire* that the requisite prejudice exists which warrants a change of venue.[2]

Further, the efficacy of depending upon the *voir dire* to determine whether substantial prejudice exists has recently been seriously questioned. Comment, Fair Trial v. Fair Press: The Psychological Effect of Pre-Trial Publicity on the Juror's Ability to Be Impartial; A Plea for Reform, 38 So. Cal. L. Rev. 672 (1965). Indeed, as the court stated in Delaney v. United States, 199 F.2d 107 (1st Cir. 1952):

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[2]This proposition is the very principle which we alluded to and found governing in the circumstances of a case previously decided by this Court. United States v. Hinton, 268 F. Supp. 728, 730-731 (E. D. La. 1967). In that case the publicity consisted solely of two newspaper articles which had appeared over two years previously. In that case it was clear that such scant publicity did not raise any presumption of prejudice, and it was necessary to await the *voir dire* to determine if any prejudice did exist. Here, though, the avalanche of adverse publicity clearly raises a presumption of prejudice so that it is unnecessary to postpone the determination until the *voir dire*.

> "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity." at 112-113.

Realizing this danger, the Supreme Court has recognized that when the pre-trial publicity is great, the court may disregard prospective jurors' assurances of impartiality. Irvin v. Dowd, supra, 366 U.S. at 727-728, 81 S. Ct. 1639; Sheppard v. Maxwell, supra; 8 Moore, Federal Practice, p. 58 (1967 Cum. Supp.); see also, Broeder, Voir Dire Examinations: An Empirical Study, 38 So. Cal. L. Rev. 503 (1965). It is therefore quite proper, if not indeed required in some instances, to make the determination, as we have done, solely on the basis of the pre-trial publicity which has undoubtedly, as here, created a dominant sentiment of prejudice in the community. Note, The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury, 42 Notre Dame Lawyer 925, 933-937 (1967).

[12] However, it is still very clear that any defendant who seeks a change of venue is presented with a formidable task, and, consequently, few defendants succeed in gaining a change of venue. 4 Barron, Federal Practice & Procedure § 2092; 8 Moore, Federal Practice ¶21.03; Note, The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury, 42 Notre Dame Lawyer 925, 929-930 (1967); Annot., 10 L. Ed. 2d 1243, 1272-1287 (1964). Yet it is equally clear that it is not to be denied when the facts of the case warrant it. Because there obviously can be no artificial formula concocted to serve as a "litmus test,"[3] United States v. Wood, 299 U.S. 123, 145-

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[3] At least one author, however, does suggest a formulary method as a solution to the problem. See Note, 33 U. Chi. L. Rev. 512, 523-530 (1966).

146, 57 S. Ct. 177, 81 L. Ed. 78 (1936), the determination of whether prejudice prevails can be made only upon a consideration of the totality of the circumstances of each particular case.

II.

[13] We now turn to the facts of this case which compelled us to grant the defendant's motion for a change of venue. Carlos Marcello, the defendant and resident of neighboring Jefferson Parish, is a well-known figure throughout the New Orleans area. His notoriety is due in large part to the nefarious publicity he has continuously attracted in this locale for many years. The newspaper exhibits which were submitted in support of the motion for change of venue are only samples of the substantial and constant publicity Marcello has received over the years. An examination of these exhibits will serve to illustrate the sinister image of Marcello which has been conveyed to the public via such publicity. On September 23, 1966, a local newspaper, the Times-Picayune, featured a front-page story describing a raid in New York and the arrest of Marcello and twelve others. The article was boldly titled: "Marcello Arrested; N.Y. Gathering Raided." The article stated that Marcello and the others who were arrested were high-ranking members of the infamous Cosa Nostra, and described the meeting which precipitated the arrests as a "Little Apalachin." The paper stated that such raids were a useful device "in keeping tabs on underworld activities." Photographs of Marcello and his brother, Joseph, also appeared on the front page in connection with the article. On the same day another local newspaper, the States-Item, published an editorial cartoon depicting Marcello's arrest in New York and indicated that Marcello has successfully avoided deportation for thirteen years. While Marcello and those arrested with him were waiting to testify before a grand jury in New York, the courthouse was evacuated while the police investigated a report that a bomb was planted in the building. This in-

cident was described on the front page of the States-Item on September 26, 1966, under the broad title: "Bomb Scare Delays Marcello's Quizzing." Characterizing the group as "underworld leaders," the article specifically referred to Marcello as "the Jefferson Parish rackets figure." The newspaper quoted the New York District Attorney as saying that the 1966 meeting "overshadows the Apalachin meeting," and also stated that an internal struggle for power within the ill-reputed Mafia was thought to be the reason for the meeting. An article in the September 30, 1966 edition of the Times-Picayune was titled: "U. S. Grand Jury Probe To 'Rock Country,' View–Organized Crime Involved, Says LaCour;" and it quoted another government official working closely with U.S. Attorney LaCour as saying that the arrest of Marcello in New York "makes it obvious that there is organized crime in this area [Louisiana] and that Marcello was there in the interests of this area." This quote was repeated in the leading editorial of the October 1, 1966 edition of the States-Item wherein the editor implored the local district attorney to ferret out the local underworld elements and bring them to justice.

Such items are numerically insignficant when compared to the mass of publicity which the defendant has attracted here. The Court itself is personally aware of the avalanche of unabated adverse publicity which has inundated the New Orleans area for many years and which continues to this very date undiminished in intensity. The above items are merely illustrative of the intense local concern which exists regarding the defendant's activities. They also reveal the tenor of such publicity and indicate the prevalent notion, which is sponsored by the news media and entertained by the populace of this area, that Marcello is the leader of the Cosa Nostra or Mafia in Louisiana.

The details of the incident leading to the present prosecution also received front-page treatment in New Orleans. On October 1, 1966, the States-Item featured a page-one story, which defendant submitted as an exhibit, describing

in vivid detail the events constituting the alleged offense. The conspicuous title was: "Marcello Is Arrested In Assault on Agent," and the subheading was: $50,000 Bond Posted Fast Here." The article quoted statements from Marcello and his attorney and referred to Marcello as "the Jefferson Parish crime figure." A photograph accompanied the article and actually shows Marcello striking the agent. The photograph was captioned in part: "Carlos Marcello, Jefferson Parish crime figure, hauls off and punches an unidentified FBI agent at New Orleans International Airport. The incident took place last night as Marcello returned from New York where he and other crime personalities were arrested and brought before a Grand Jury probe into organized crime." It is impossible to overlook the damaging prejudice to Marcello created by this article and the photograph of the alleged crime as it actually occurred if he were required to stand trial on this charge here in New Orleans.

Perhaps some of the most damaging publicity exhibited herein is to be found in the September 1 and September 8, 1967 copies of Life Magazine. These articles purport to "expose" organized crime in the United States. They were obviously intended to inflame the public and arouse the ire of the conscientious citizenry against the unsavory activities of the national crime syndicate. On September 1, 1967, the cover of Life read: "Brazen Empire of Organized Crime—The Alarming Growth of a Multibillion-Dollar Cartel Founded on Corruption, Terror and Murder." A week later the cover read: "Brazen Empire of Crime, Part II—How the Mob Muscles Into Your Daily Life." The feature article was entitled: "The Mob." In infuriating style, calculated to alarm and arouse the reader, the article vividly described the sordid operations of the multibillion-dollar crime syndicate in this country, commonly known as the Cosa Nostra or Mafia. Not only did the articles reveal the disgusting sources of illegal income to the syndicate—narcotics, prostitution, gambling, and the like—but they also described the thoroughly repulsive methods used to achieve and maintain power, which methods range from cheating

and defrauding, bribery and political corruption, to more violent acts of terrorism, bombings and outrageous, brutal murders. Specific instances, complete with names, dates and locations, substantiated each of these claims. In addition, the identities of the alleged leaders of this odious association were revealed, and photographs of each, including Marcello, accompanied the articles. The activities of many of these men, referred to as "murderers and thieves," were discussed at length. Both editions of the magazine focused particular attention upon Marcello and his activity in Louisiana.

One article, entitled "The Fix" and featuring a full-page close-up photograph of Marcello, gave an account of a two million dollar bribery attempt, headed by Marcello, which was designed to secure the release of a convicted felon, James Hoffa. Another article describing Marcello's empire had a two-page title reading: "Carlos Marcello: King Thug of Louisiana." This article bared his alleged Cosa Nostra operations here in Louisiana. The story was substantiated in detail with well-known names, including politicians and state officials who are allegedly controlled or influenced by the Cosa Nostra, in addition to places and dates, and was bolstered with many photographs. In addition, the article reviewed the details of the present prosecution. These magazine articles, together with articles from the September 12 and 13, 1967, editions of the Times-Picayune which reported the Governor of Louisiana's desire to "get rid of Marcello," were offered as exhibits at the hearing in support of the motion for change of venue.

The highly inflammatory effect in this area of the Life articles cannot be denied. Shortly after they appeared, the Governor of Louisiana made a fiery and determined pledge to oust organized crime from the state. This prodded a number of grand jury investigations into organized crime activities in the state. These investigations, in which Marcello figures prominently, are still continuing. Almost daily accounts of the latest developments saturate the local news reports.

This Court is definitely of the opinion that the publicity which the defendant has received has been so highly prejudicial in nature and so pervasive in this area that it would prevent the defendant from receiving a fair and impartial trial in this state. For many years the defendant has been the subject of very extensive and damaging local publicity. This publicity has undoubtedly imprinted upon the mind of the public the image of the defendant as being a most sinister and evil character. In fact, it is assumed, in a rather cavalier fashion, that Marcello is the "gangland leader" in Louisiana of the most ruthless and corrupt crime syndicate in the nation. We seriously doubt that the citizens of this area could expunge this long-standing and prevalent notion from their minds in an attempt to objectively consider the merits of this case.

The current publicity accorded Marcello, which is highly prejudicial in its own right, continues to foster this image. His past criminal record is repeatedly reviewed and kept in the public eye. In fact, all but a small portion of the present prejudicial publicity has concerned offenses and accusations totally unrelated to the instant prosecution. However, the publicity which the present prosecution attracted was also very damaging. If the memory of this year-old offense had ever commenced to fade, it was shockingly revived and reviewed by the intensely inflammatory articles recently appearing in Life. These startling articles caused a furor among the people of Louisiana. At present there is still no indication that the outraged indignation caused by the Life articles will subside in the near future.

With all of these factors in mind, we felt that defendant would have a much better chance of securing a fair and impartial trial in another state. The abusive publicity constantly showered on Marcello by the local news media has certainly not had the same effect outside the state if, indeed, it has even progressed beyond the boundaries of the state. And while it is true that Life magazine is circulated nationally, we are certain that the articles primarily con-

cerned with Marcello were not read in most other states with as much interest, or with the same effect, as here in Louisiana. Because these articles were particularly directed to Louisiana, they had a peculiar interest for Louisiana readers, and it is only natural to expect that they would be read with greater attention by, and be more impressive upon, Louisiana readers.

For these reasons it was readily apparent to this Court that Marcello was entitled to a change of venue as he requested, and we have no hesitancy in granting his motion. Rideau v. State of Louisiana, supra; United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1963); Juelich v. United States, 214 F.2d 950 (5th Cir. 1954); United States v. Rossiter, supra; United States v. Parr, supra; United States v. Florio, supra.

III.

With this background, we now proceed to a consideration of the present motion urging us to withdraw our former order granting the change of venue. While the defendant's argument on this motion has not been sharply defined, the defendant basically contends that he withdrew his motion for a change of venue and that even if he did not, he has the constitutional right to be tried here and that he has not waived that right.

[14] First, we deal with the contention that the defendant abandoned his motion for change of venue at the oral argument. This contention is based solely on the fact that at oral argument counsel for defendant informed the Court that he was not "pressing" the request for change of venue. Four cases are cited to support this contention: Southeastern Express Co. v. Robertson, 264 U.S. 541, 44 S. Ct. 424, 68 L. Ed. 840 (1924); Abrams v. American Security & Trust Co., 72 App. D.C. 79, 111 F.2d 520, 129 A.L.R. 368 (D.C. Cir. 1940); United States v. Chicago B & Q. R. Co., 82 F.2d 131, 106 A.L.R. 942 (8th Cir. 1936); State v. Blount, 200 Or. 35, 264 P.2d 419, 436, 44 A.L.R.

2d 711 (1953). An examination of these cases, however, reveals that they are completely inapposite to the facts of the present case, and they fail to sustain defendant's contention.

In fact, it is very clear that the defendant did not abandon or withdraw his motion for change of venue. When asked if he was ready to argue the motion for change of venue, defense counsel replied: "Yes, I will be very happy to." Then he proceeded to very forcefully argue the motion and pointed out all the reasons why the motion should have been granted. There is no indication whatsoever that defendant intended to withdraw or abandon the motion. Even the singular straw which defendant now grasps to support this argument withers when the statement is taken in context. Defense counsel stated: "I feel that we should not be obligated to try this case in this atmosphere at this time. I am, naturally, withdrawing a request for a change of venue—*I beg your pardon*—I am not pressing my request for a change of venue at this time." Thus, it is abundantly clear that abandonment of the motion for change of venue was not within defendant's contemplation and cannot be inferred as defendant now urges. In fact, the above statement shows that defendant definitely and clearly did not want to abandon the motion. Further, it would be utterly absurd to believe that if the motion had been denied and if the defendant had been convicted that a higher court would then preclude the defendant from arguing on appeal that this Court erred in denying the motion for change of venue on the basis that it had been abandoned. Corey v. United States, 346 F.2d 65 (1st Cir., 1965); Maxwell v. United States, 334 F.2d 181, 184 (5th Cir. 1964). There is, simply and clearly, no merit to the argument that the motion for change of venue was abandoned.

The defendant, however, would have us believe that he preferred to have a continuance to a change of venue. We gather this from Marcello's affidavit, accompanying the

present motion, which states: "Subsequent to the publication of the Life magazine articles, and prior to September 13, 1967, I advised my attorneys that I desired a postponement of my case because of adverse and prejudicial publicity but not any change of venue," and from the motion itself which reads: "Defendant Carlos Marcello had instructed his counsel not to pursue a change of venue after the publication of the Life Magazine articles * * *." Significantly, these carefully worded statements refrain from claiming that the defendant did not want a change of venue in any event. Indeed, if the defendant had made such a statement, the circumstances of this case would necessitate our finding the statement to be totally incredible. The gist of the statements is that the defendant wanted a continuance first and foremost. Thus, they merely amount to an allegation by the defendant of his *preference*. Assuming that the defendant did, in fact, prefer a continuance to a change of venue, we fail to see how this has any legal effect under the circumstances of this case.

[15] The motion was one for a continuance *and* a change of venue. The motion for change of venue was not an alternative motion, nor was it ever in any way conditioned upon the failure to gain a continuance. The defendant simply asked for two things in the same motion. While this may be somewhat unusual, it was our understanding at the time the motion was filed, and during the argument thereon, that the defendant was simply seeking to obviate the substantial prejudice prevailing against him in this district by one means or another and that it did not make any difference which method was used as long as the result—a fair and impartial trial free from prejudice—was obtained. As we noted during argument on the original motion, we did not believe that a continuance would accomplish the the result sought by the defendant due to the continuing nature of the prejudicial publicity in this area. It is pertinent to observe at this point that time has proved our judgment of five months ago to be correct in this respect. In relation to how long a continuance would have

to be in order to be effective, defense counsel suggested five months. Five months have elapsed, and we are even more firmly convinced that the defendant could not obtain a fair and impartial trial in this district due to the prejudice created by constant adverse publicity. The continuous nature of such publicity simply forecloses this possibility at the present as well as at any foreseeable time in the future. Obviously nothing is gained by a continuance under such circumstances, except to delay the inevitable, and it is improper to grant the continuance in such a situation because it does not obviate the difficulty. United States v. Bonanno, 177 F. Supp. 106, 122 (S.D.N.Y. 1959); United States v. Hoffa, 156 F. Supp. 495, 500 (S.D.N.Y. 1957). Consequently, the only efficacious means available to secure the result sought by defendant was to grant the change of venue which he requested. The change of venue sought by the defendant is peculiarly effective in this situation in light of the fact that the continuous pervasive publicity attendant in this area does not exist in other areas, and the fact that such publicity as does exist elsewhere would not arouse the same indignation as locally. In granting the change of venue, we secured for the defendant what he so desperately wanted–a fair and impartial trial–by the only effective method of the two he requested–a change of venue. For the defendant to now say that he preferred to have a continuance is without legal effect unless, of course, his request for change of venue was conditioned upon his failure to obtain a continuance. But it was not so conditioned, and the defendant does not even claim now that it was conditioned. Had we ever thought that it was, either expressly or impliedly, we would have merely denied the motion for continuance in order to bring the condition into effect, and then granted the motion for change of venue. However, it was very clear to us that such was not the case and, as we indicated at oral argument, we thought it would be more proper to leave the motion for continuance intact in order that the defendant might urge it to the transferee court in the event that the Life articles did have a damaging effect in that district.

[16-19] We turn now to the defendant's contention that his waiver was ineffective. Article III, Section 2, Clause 3 of the United States Constitution and the Sixth Amendment to the Constitution grant a defendant the right to be tried in the state and district where the alleged crime was committed. It is clear, though, that this right is a personal privilege which may be waived by the accused. Hilderbrand v. United States, 304 F.2d 716, 717 (10th Cir. 1962); Lafoon v. United States, 250 F.2d 958, 959 (5th Cir. 1958); Earnest v. United States, 198 F.2d 561, 562 (6th Cir. 1952); United States v. Gallagher, 183 F.2d 342, 345-347 (3rd Cir. 1950); Levine v. United States, 182 F.2d 556, 558-559 (8th Cir. 1950). This right is clearly waived when the defendant seeks a change of venue. Federal Rule of Criminal Procedure 21, Notes of Advisory Committee on Rules, Comment 3; 4 Barron, Federal Practice & Procedure § 2092; 8 Moore, Federal Practice ¶ 21.02. While we need not decide whether the bare motion for a change of venue operates as a waiver, we do hold, in light of the plain meaning of the authorities just cited, that when the motion was granted, the waiver became effective even though a written order implementing the change has not yet been entered. The defendant's contention that he will not accept transfer to the district we now assign and therefore has not waived his right to be tried here is based upon United States v. Parr, supra. In that case the prosecution was instituted in the Corpus Christi Division of the Southern District of Texas and the defendant requested that the case be transferred to the Laredo Division of that same district. The defendant made it clear, however, that he wished to be transferred only to the Laredo Division and that if the case was not transferred to the Laredo Division, then he wished to be tried in the Corpus Christi Division. Marcello, however, did not so limit his request nor did he even suggest any district to which the case might be transferred. Thus, his reliance on *Parr* is obviously misplaced. Further, *Parr* involved a transfer from one division to another within the same district and was based on Rule 19 which, at that time, *required*

the defendant to consent to the particular transferee district. It was to avoid the possible debilitating consequences of *Parr* that Rule 21(a) was amended in 1966 to make it clear that the court may select the district to which the case may be transferred. Thus, the defendant's contention that he does not now consent to a transfer is without merit in view of the fact that he has already waived his right to be tried here and the fact that he has no right to, nor did he in fact, insist on a transfer to any particular district.

The defendant, however, would have us believe that he, personally, did not desire a change of venue and, predicated on this postulate, he argues that his waiver was ineffective in light of Green v. United States, 355 U.S. 184, 191, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957) and Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), because it was not a knowing and voluntary relinquishment of his constitutional right.

[20-22] We are certainly in complete agreement with the assertion that a waiver of this constitutional right requires the defendant to know and fully understand the nature of his right before the waiver will be effective. Johnson v. Zerbst, supra. The defendant, however, does not contend that he did not fully know and understand his rights, and we have no independent cause to suspect otherwise in view of the fact that he is not an illiterate or ignorant man, but rather is quite intelligent and very articulate, and the additional fact that he was represented by three highly competent and experienced trial attorneys who most surely advised him of his rights. The defendant's own affidavit accompanying the present motion indicates that he was personally aware of his right to be tried here. Thus, we have no doubt whatsoever that the defendant here did fully understand and appreciate the nature of his rights and the effect that a change of venue would have. Further, even if this were a case where the defendant's own personal knowledge of his rights was in doubt, it would make no difference because his attorneys' choice

would be binding upon him as an effective waiver. Henry v. State of Mississippi, 379 U.S. 443, 451-452, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965); Miranda v. State of Arizona, 384 U.S. 436, 513, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (Harlan dissenting).

[23] We fail to see, nor does the defendant suggest, how the defendant's present assertion that he preferred a continuance to a change of venue could in any way detract from the voluntary or intentional nature of the waiver in view of the fact that the defendant did forcefully urge his motion for change of venue. Certainly, this was no " 'grisly,' hard, Hobson's choice" which would operate to relieve the defendant of his waiver. Whitus v. Balkcom, 333 F.2d 496, 499 (5th Cir. 1964). See also Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963). We are completely satisfied that the defendant's action were deliberate, intentional, and wholly voluntary in every respect.

The defendant does not claim that his attorneys disobeyed his instructions by obtaining the change of venue nor does he claim that they were derelict in their duties by not withdrawing the motion for change of venue. The defendant would have more substantial legal standing if he had done so, though. However, if it had been defendant's intention to attack his attorneys, we think that it would only be reasonable to expect him to do so explicitly. We are slow to draw such an irrational inference when, as here, the defendant is represented by three very capable and reputable attorneys. This is especially true when the defendant has shown nothing to substantiate such a claim and when all the circumstances indicate exactly the contrary.

[24] The defendant was represented by *three* very competent and experienced attorneys, and it would be highly improbable that any one, much less all three, would be derelict in carrying out the defendant's wishes. It would be even more improbable that they would act in conspiracy to deliberately disobey the defendant's instructions. And if they did do either, it would be virtually incredible that Mar-

cello would retain all three of them to argue the present motion. Further, some significance may be attached to the fact that the same three attorneys have represented the defendant in a number of other prosecutions, and in at least three of them a motion for a change of venue was filed.[4] Finally, and perhaps most importantly, the defendant was present in Court when the motion for a change of venue was argued. He had ample time and opportunity to speak to either his attorneys or to the Court if his attorneys were, in fact, proceeding against his wishes, or if he did, in fact, wish to be tried here. Any assertion that Marcello would sit idly by and allow his attorneys to proceed against his wishes would be utterly incredible.

[25] Thus, even if we were willing to draw the inference that the defendant was attacking his attorneys, all the indications would clearly refute such an allegation. Moreover, if there was any doubt whatsoever as to the falsity of such a claim, the fact that Marcello was present and did not indicate the slightest objection to either his attorneys or to the Court would bar all grounds for now objecting. Such knowing acquiescence would surely constitute an intentional and voluntary relinquishment of his right to be tried here. Leser v. United States, 358 F.2d 313 (9th Cir. 1966); Hensley v. United States, 108 U.S. App. D.C. 242, 281 F.2d 605 (D.C. Cir. 1960). Consequently, we find the contention that the defendant did not waive his right to be tried here to be absolutely with no merit whatsoever.

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[4]Prosecutions in which the defendant, represented by the same three attorneys, filed a motion for change of venue were: United States v. Carlos Marcello and Joseph Matassa, Criminal Action No. 29711, E.D. La. 1964; United States v. Carlos Marcello and Joseph Marcello, Criminal Action No. 28365, E.D. La. 1961; United States v. Carlos Marcello, Criminal Action No. 28366, E.D. La. 1961. It is, of course, proper for us to take judicial notice of the records in these cases. Ackermann v. United States, 178 F.2d 983 (5th Cir., 1949), aff'd 340 U.S. 193, 71 S. Ct. 209, 95 L. Ed. 207 (1950); Romero v. Frank's Casing Crew & Rental Tools, Inc., 229 F. Supp. 41 (W.D. La., 1964), aff'd 342 F.2d 999 (5th Cir., 1965).

[26] Having found that the defendant did not abandon his motion for change of venue and that his waiver was effective, the question remains as to whether we will vacate our order granting the transfer. While the defendant has not cited us to any authority controlling this situation, we feel that it is governed by the general principle that a request to vacate an order once entered is directed, in the absence of error, to the Court's discretion. See 92 C.J.S. Venue § 200 (1955) and cases cited therein.

[27] Ordinarly, this Court makes every effort to accommodate the wishes of the litigants who appear before us. This is especially true in a criminal case. There are, however, limits to our judicial tolerance. The defendant has seriously strained these limits. He appeared before this Court while his attorneys strenuously argued his well-briefed and excellently prepared motion for change of venue. The argument was adamant and stressed the urgent need to protect the defendant's rights. The argument was well taken and the defendant received the exact relief which he requested and to which he was entitled. Moments later the Court was notified that the defendant had a sudden change of heart. Such an abrupt about-face is extremely strange, to say the least. We have here a defendant who vigorously argued a motion, which was thoroughly thought out in advance, and who, only moments after successfully presenting his motion and while the situation remained exactly the same, requested that the action he so deliberately precipitated be annulled. Either the defendant desired a change of venue or he did not. As indicated above, there can be no doubt that at the time of oral argument, the defendant did desire a change of venue. Yet, now he boldly states that he does not desire a change of venue. The only plausible motive supporting such bizarre conduct is that the defendant is now merely seeking to prepare a record for appeal in the event that he is convicted. The defendant obviously wants two bites at the apple; such fast and loose play, however, is not favored in this Court. We are certainly not suggesting that any defendant must forego any pos-

sible means of securing and preserving his rights. Quite the contrary, for this Court is very sensitive to insuring that the rights of each and every defendant be protected at every stage of the litigation. But we refuse to allow a defendant, who has made a binding election, to renounce his choice when his renunciation stems from a "Heads-I-win-tails-you-lose" attitude and which is supported by absolutely no legally acceptable basis. The defendant would be in a better position if his action could be elevated even to the dignity of strategy or trial tactics. But his Janus-faced behavior falls miserably short of this mark.

The defendant seeks to impress us with the promptness of his request. However, merely because the defendant's action resulted from clever and quick thinking does not eradicate the taint of his unworthy motive. Such quick action, in fact, only solidifies our conviction that the defendant was straddling both sides of the fence.

We are not unmindful of the defendant's reliance upon Stevens v. Marks, 383 U.S. 234, 86 S. Ct. 788, 15 L. Ed.2d 724 (1966), for the proposition that a defendant ought to be allowed to withdraw his waiver of a constitutional right when there is no justification for the refusal to do so. We have already pointed out that ordinarily this Court would receive such a request favorably. We are firmly convinced, however, that there is more than good cause present in this case which necessitates our denial of the defendant's request. Because of our strong conviction that the defendant is unlikely to obtain a fair and impartial trial in this state, which prompted our granting the defendant a change of venue, it is very likely that if he is tried here and convicted, the conviction would be reversed on appeal for lack of due process.[5] Thus, we are taking all possible precautions to in-

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[5]Even though counsel for defendant stated at the hearing on the present motion that he would not argue to the appellate court, if this case reached that stage, that venue should have been changed, this . . .

sure that the defendant does receive a fair and impartial trial. For this reason and the reason mentioned above, we are compelled to deny the motion to vacate our former order granting the change of venue.

[28] At the hearing on the motion for change of venue, the Court indicated to the defendant that he would be given thirty days in which to suggest up to three transferee districts to the Court. The government was given the right to make the same number of suggestions as the defendant might make. The Court, however, specifically noted that it would not be bound by any of the suggestions. This was satisfactory to both parties. The defendant has failed to submit any suggestions, and consequently none have been forthcoming from the government. The Court, of course, has the authority under Rule 21(a) to transfer the case to a district of its own choosing. It is the Court's impression that very little, if any, publicity of the defendant has been attendant in at least several divisions of the United States District Court for the Southern District of Texas. Consequently, there ought to be no difficulty in securing a fair and impartial trial for the defendant in that district. Further, as this transferee district is located in the neighboring State of Texas, there should be a minimum of inconvenience to the defendant.

Therefore, it is ordered that the defendant's motion to reconsider the Court's former order directing a change of venue be, and the same is hereby, denied. It is further ordered, adjudged and decreed that the above-styled cause be, and the same is hereby, transferred, together with all the remaining and pending motions, to the United States District Court for the Southern District of Texas.

It is further ordered that the Clerk of this Court take all necessary action to transfer the record and papers in this case to the United States District Court for the Southern District of Texas.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26773

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CARLOS MARCELLO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(February 18, 1970)

Before BROWN, Chief Judge, DYER, Circuit Judge and HUNTER, District Judge.

BROWN, Chief Judge: This is an appeal from Appellant's conviction of forcibly assaulting and intimidating an officer of the FBI in violation of 18 U.S.C.A. § 111.[1] Fifteen points of error are raised, each of which we find wanting and affirm.

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[1] 18 U.S.C.A. § 111 provides:

"Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his offical duties,

U.S.A. v. CARLOS MARCELLO

On September 30, 1966 Carlos Marcello arrived at the New Orleans airport where, because of his reputation as a Mafia boss, he was immediately surrounded by newspapermen and photographers. Among this group was FBI agent Patrick Collins, posing as a deplaning passenger, and his co-agent photographer whose job it was to keep an eye on Marcello. This crowd followed Marcello through the airport and onto the upper ramp outside where Marcello, angrily and with some profanity, inquired whether the photographers had taken enough pictures. Collins, with arms folded, answered in the negative, and Marcello retorted: "Are you looking for trouble?" which elicited the not unexpected reply from Collins that "I can handle trouble." This exchange had an unsettling effect on Marcello who took a couple of short jabs at Collins and attempted to mow him down with a haymaker which never really got off the ground because of his brother Joseph's restraint. For this fray Marcello was first indicted on October 7, 1966 for assault, but this indictment was dismissed on a motion asserting a failure to comply with the requirements of *Rabinowitz v. United States*, 5 Cir., 1966, 366 F.2d 34 (en banc). On June 1, 1967, he was reindicted by a grand jury

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shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

18 U.S.C.A. § 111.

"Any officer or employee of the Federal Bureau of Investigation of the Department of Justice" is among the "persons designated in section 1114."

in the New Orleans division of the Eastern District of Louisiana for the same offense.

On July 3, 1967 Appellant filed, among others, a "motion for continuance and for a change of venue." These motions were heard on September 13, 1967, and the motion for a change of venue was immediately granted because of extensive prejudicial publicity in the New Orleans area. Not more than 10 minutes after the conclusion of the hearing and the granting of the motion, defense counsel made an oral ex parte request for the Court to withdraw its order. The Court kept this motion under advisement for 5 months and on March 1, 1968, it ordered the case transferred to the Southern District of Texas. The case came on for trial before Judge Connally in Laredo, Texas in May of 1968 and resulted in a hung jury and mistrial on May 29. The case was reset before Judge Singleton in Houston and on August 8, 1968 a verdict of guilty was returned. On September 12, 1968 Appellant was fined $5000 and sentenced to two years imprisonment.

Appellant's argument on appeal is pentadecal. He raises issues concerning (1) the constitution of the grand jury, (2) failure of the indictment to allege an offense, (3) procurement of the indictment by misconduct, (4) immunity from prosecution, (5) change of venue, (6) change of place of trial, (7) deprivation of records, (8) Cosa Nostra and Mafia references at the trial, (9) improper reference to a document not in evidence, (10) knowledge as an element of the offense, (11) willful intent to injure as an element of the offense, (12) entrapment, (13) refusal of the Trial

Court to require an election between the issues of intimidation and assault, (14) refusal to grant motion of acquittal, motion in arrest of judgment and a new trial, (15) improper basis for sentencing.

1. Illegal Grand Jury

Appellant's first point is that he was denied his right to be indicted by a grand jury compiled from a fair cross section of the community. *Hill v. Texas*, 1942, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559; *Rabinowitz v. United States*, 5 Cir., 1966, 366 F.2d 34 (en banc). The jury list from which the indicting grand jurors were chosen was composed of residents of only 7 of the 13 parishes comprising the New Orleans Division of the Eastern District of Louisiana[2] pursuant to a direction by the Court under the power granted it by 28 U.S.C.A. § 1865(a),[3] as it existed prior to the Jury Selection and Service Act of 1968.[4]

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[2]The omitted parishes were Assumption, La Fourche, St. James, Tangipahoa, Terrebonne, and Washington.

[3]Section 1865(a) provided:

> "Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. To this end the court may direct the maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place."

28 U.S.C.A. § 1865(a).

See note 4, *infra*.

[4]On December 22, 1968 the new Jury Selection and Service Act, 28 U.S.C.A. §§ 1861 et seq., amending § 1865(a) note 3, *supra*, § 1862 note 6, *infra*, § 1863 note 7, *infra*, became effective. It calls for the adoption by the District Court as the reviewing

panel (Judicial Council and the Chief District Judge concerned) of a "written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 [selection at random from a fair cross section] and 1862 [prohibition of a discrimination] * * *."

"Among other things, such plans shall —

* * * *

(5) specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title.

(6) specify those groups of persons or occupational classes whose members shall be barred from jury service on the ground that they are exempt. Such groups or classes shall be exempt only if the district court finds, and the plan states, that their exemption is in the public interest and would not be inconsistent with sections 1861 and 1862 of this title. The plan shall provide for exemption of the following persons: (i) members in active service in the Armed Forces of the United States; (ii) members of the fire or police departments of any State, district, territory, possession, or subdivision thereof; (iii) public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory, or possession or subdivison thereof, who are actively engaged in the performance of official duties.

(7) fix the distance, either in miles or in travel time, from each place of holding court beyond which prospective jurors residing shall, on individual request therefor, be excused from jury service on the ground of undue hardship in traveling to the place where court is held."

The new act specifically does not apply to the case at bar:

"This Act shall not apply in any case in which an indictment has been returned or petit jury empaneled prior to such effective date [December 22, 1968].

Pub. L. 90-274, § 104.

The reviewing panels for all the Districts in the Fifth Circuit

U.S.A. v. CARLOS MARCELLO

The indictment in a criminal case must be returned by a grand jury "drawn from a pool of persons broadly representative of the community." *Rabinowitz v. United States, supra,* at 45.[5] This, of course, does not mean that every conceivable group has to be represented on the jury list.[6] What it does mean is that the list must generally approximate the community and its different interests. *Smith v. Texas,* note 5, *supra.*

Appellant attacks on two grounds the exclusion of names from the 6 parishes. First he says that it was taken pursuant to 28 U.S.C.A. § 1863[7] (before the 1968

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adopted plans which prescribe, among other things, that grand jurors are to be drawn from the whole of the District or Division for District or Division grand juries respectively. See Judge Gewin's article, The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals, 20 Mercer L. Rev. 349 (1969).

[5]See Smith v. Texas, 1940, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84; Glasser v. United States, 1942, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; Thiel v. Southern Pacific Co., 1946, 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181; Mobley v. United States, 5 Cir., 1967, 379 F.2d 768. See also the series of en banc decisions of this Court heard with *Rabinowitz:* Scott v. Walker, 5 Cir., 1966, 358 F.2d 561, 564; Billingsley v. Clayton, 5 Cir., 1966, 359 F.2d 13, *cert. denied,* 385 U.S. 841, 87 S.Ct. 92, 17 L.Ed.2d 74; Davis v. Davis, 5 Cir., 1966, 361 F.2d 770; Labat v. Bennett, 5 Cir., 1966, 365 F.2d 698, *cert. denied,* 1967, 386 U.S. 991, 87 S.Ct. 1303, 18 L.Ed.2d 334; Brooks v. Beto, 5 Cir., 1966, 366 F.2d 1, *cert. denied,* 1967, 386 U.S. 975, 87 S.Ct. 1169, 18 L.Ed.2d 135.

[6]For example, firemen were excluded by statute, 28 U.S.C.A. § 1862. The new Act also provides for their exclusion. See note 4, *supra.*

[7]Section 1863 provided:

> "(a) A district judge for good cause may excuse or exclude from jury service any person called as a juror.
>
> (b) Any class or group of persons may, for the public interest, be excluded from the jury panel or

amendments) and that since no findings were made by the Trial Judge as required by § 1863, the exclusion was invalid. The fact of the matter is that the parishes were not excluded by a single Trial Judge under §1863. Rather, they were excluded by order of the District Court en banc dated October 8, 1948 as amended on January 20, 1967 by adding the parishes of St. John the Baptist and St. Charles pursuant to the authority granted by 28 U.S.C.A. § 1865[8] (before its amendment).

Appellant has not shown that the exclusion of the parishes is anything but conducive to the goal of achieving an impartial trial without incurring unnecessary expense or unduly burdening the citizens of any part of the district with jury service. The action of the Judges of the Eastern District of Louisiana was reasonable and in accord with § 1865 and the Constitution.

A related complaint is that, disregarding the technical validity of the excluding order, it resulted in a jury list that was not representative of the community in the blue collar workers were systematically exclud-

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excused from service as jurors by order of the district judge based on a finding that such jury service would entail undue hardship, extreme inconvenience or serious obstruction or delay in the fair and impartial administration of justice.

(c) No citizen shall be excluded from service as grand or petit juror in any court of the United States on account of race or color."

28 U.S.C.A. § 1863.

See note 4, *supra*.

[8]See notes 3 and , *supra*.

On this record the constitutionality of § 1865 in its pre-1968 form is not open to question.

ed, if not completely, at least partially, from the list by reason of the parish exclusion. See *Labat v. Bennett*, note 5, *supra*. He offered no facts to establish the truth of this assertion, and since the burden is on him to do so, *Jackson v. Morrow*, 5 Cir., 1968, 404 F.2d 903; *Ware v. United States*, D.C. Cir., 1965, 356 F.2d 787, *cert. denied*, 383 U.S. 919, 86 S.Ct. 914, 15 L.Ed.2d 673; *Frazier v. U.S.*, 1948, 335 U.S. 497, 503, 69 S.Ct. 201, ——, 93 L.Ed. 187, 194; *Glasser v. U.S.*, 1942, 315 U.S. 60, 87, 62 S.Ct. 457, 86 L.Ed. 680, this contention fails.

2. Insufficient Indictment

Appellant's second contention is that the indictment failed to allege an offense. The indictment alleged that Carlos Marcello "did forcibly assault and intimidate Patrick J. Collins, Jr., an officer of the Federal Bureau of Investigation, while *** Collins was engaged in the perforanmce of his official duties in violation of Title 18, United States Code, Section 111." In almost the same words (see note 1, *supra*) § 111 makes it a crime to do just this.

Appellant offers no argument on appeal to support his contention, but at the pre-trial stage he argued that the indictment did not allege that Marcello knew Collins to be an FBI agent and that knowledge is an element of the offense. This same contention is more forcefully raised later (contention number 10) and we will discuss it then. It suffices to say that Appellant's second contention is wholly without merit.

3. Prosecution Misconduct

Appellant's third contention, that the indictment was procured by the misconduct of the prosecuting officials and therefore should have been dismissed, is apparently based on a statement reportedly made by a government attorney to the New Orleans press that the arrest of Marcello in New York City at an organized crime meeting "makes it obvious that there is organized crime in this area [New Orleans] and that Marcello was there in the interests of this area." Marcello asserts that this announcement was highly improper and was calculated to and did influence the grand jury in its deliberations in bringing the indictment. That the claim borders on the frivolous is shown by the fact that the statement was made before the occurrence of the incident leading to his indictment. It appeared in the newspaper on Friday morning, September 30, 1966. The assault did not occur until that evening.

4. Immunity

Appellant's next contention meets the same fate as his preceding ones. After the alleged assault but before the Federal trial, Appellant was called before a Queens County, New York grand jury investigating organized crime. Under the New York State immunity statute he was granted immunity from prosecution (as well as from the use of testimony elicited) for any crime he might mention in his testimony. While testifying he was asked whether he was under indictment anywhere and replied that he was, in Louisiana for assault

on a federal officer. Now he contends that his answer while under the Queens grand jury's grant of immunity insulates him from prosecution for this crime in Federal Court in Louisiana and Texas.

He argues that *Murphy v. Waterfront Commission*, 1964, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678, holds that when the state grants immunity to a witness, this grant is binding on the federal government. Hence, the argument goes, the Queens grant immunized him from prosecution for any crime mentioned and since he mentioned that he had been indicted for assault, Queens could not try him for this assault, and since Queens could not try him neither could the United States.

This contention fails for several reasons. The most obvious of which is that if his contention were accepted then any arm of the state with state-bequeathed power to grant immunity could thwart any federal prosecution. The power to grant immunity from prosecution may not be the power to destroy, *M'Culloch v. Maryland*, 1819, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579, but it would then be the power to frustrate federal crime control. In opposition to this approach it is urged that protection of a defendant's Fifth Amendment privilege against self-incrimination outweighs the possibility of harm that a state could cause. But *Murphy, supra*, provides adequate protection for these rights by denying to the federal government the use of Defendant's testimony.

A second reason why Defendant's argument must be rejected is because as to the question posed and its answer, he did not have the privilege against self-incrimination. Consequently the grant of immunity did not cover his response.

There was no basis for the privilege here because the information gleened from an answer to this question, no matter what the answer might have been, could not possibly result in, or present evidence leading to, any criminal or civil liability relating to a penalty or forfeiture since the information contained in the statement was already a matter of public record. The question and answer revealed nothing new or unknown.

5. Venue

Appellant's fifth contention is that the District Court erred in changing venue from the Eastern District of Louisiana to the Southern District of Texas and that he was thereby denied his Article 3, § 2, cl. 3 and Sixth Amendment and Rule 18 rights to a trial by an impartial jury of the State and district where the crime was committed.*

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*Article III, § 2, cl. 3 provides:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

U. S. Const. art. III, § 2, cl. 3.

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an im-

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The facts here are of the utmost importance. On July 3, 1967, defendant moved for a continuance and for a change of venue[10] because of "widespread front-page newspaper coverage" of the alleged assault and other publicity which "was such as to prejudice the readers of the same against defendant." With this motion defendant filed as exhibits several New Orleans newspaper articles which, to say the least, were highly inflammatory.[11] On August 1, 1967 this and other mo-

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partial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

U.S. Const. amend. VI.

Rule 18 provides:

"Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses."

F. R. Crim. P. 18.

[10]Rule 21(a) provides:

"(a) *For Prejudice in the District.* The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district."

F.R. Crim. P. 21(a).

[11]Appellant filed seven exhibits consisting of articles, editorials, and photographs found in the New Orleans newspapers, *The Times-Picayune* and *The States-Item*, during the period from September 23, 1966 to October 1, 1966. The first was an article

tions were continued to September 13, 1967 when they came up for hearing before Judge Heebe. At the Judge's suggestion, in which all acquiesced, the motion styled "Motion for Continuance and for a Change of Venue" was heard first, his reasoning being that disposition of the venue motion favorable to defendant would make determination of the other motions inappropriate since they would be transferred with the case.

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and accompanying photographs in the September 23 *Times-Picayune* describing a raid in Queens, New York upon a "little Apalachin" meeting (this term came from "the 1957 gangland conference of 60 hoodlums and their friends at Apalachin, New York") with Carlos Marcello in attendance. The second is a September 26 *States-Item* political-type cartoon pointing out Marcello's presence at the raided meeting and his avoidance of deportation for 13 years. The third exhibit consists of two front-page *States-Item* articles of September 26 — one concerning the investigation of organized crime in New Orleans, tying in the Queens "little Apalachin" meeting, and the other telling of a bomb scare delaying the Queens County grand jury questioning of "12 reputed Mafia leaders, including Jefferson Parish rackets figure Carlos Marcello * * *."

Next we find a front-page story in the *Times-Picayune* of September 30 and an editorial in the October 1 issue of *States-Item* both quoting the coordinator of the Department of Justice's organized crime section for Louisiana, Mississippi, Alabama, and Georgia as saying that the recent arrest of Carlos Marcello in New York "makes it obvious that there is organized crime in this area and that Marcello was there in the interests of this area." Defendant's next exhibit is a photograph of the assault in the *States-Item* captioned "CARLOS MARCELLO, Jefferson Parish crime figure, hauls off and punches an unidentified FBI agent at New Orleans International Airport." Marcello's last exhibit in support of his motion for change of venue is an October 1, 1966 statement in the *States-Item* that he had been arraigned on charges stemming "from a punch the Jefferson Parish crime figure threw at FBI agent Patrick J. Collins, Jr. * * *."

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Appellant's counsel opened the hearing by pointing out three groups of instances that persuasively proved that Marcello could not get a constitutionally guaranteed fair trial in Louisiana. One was several newspaper articles in the New Orleans area (see note 11, *supra*), another was an article in the September 1, 1967 issue of *Life Magazine*[12] and the third consisted of two published statements by Louisiana Governor McKeithen.[13] Counsel then stated:

> "Now, it is in this atmosphere, nationwide, adverse publicity that we are asked to try this particular case. At the time I originally prepared the motion I thought maybe something could be done to assist Mr. Marcello with regard to a change of venue. But I know of no place where I think at this particular time, with the adverse publicity at its height, that Mr. Marcello would receive a fair trial, in view of this adverse publicity. * * *

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[12]The magazine article stated that Carlos Marcello was the organized crime kingpin in New Orleans. It also described this particular assault.

[13]Counsel for Appellant characterized the Governor's statements:

> "His first statement seemed to be that the present laws could not deal with Mr. Marcello, and this is reported in the *Times-Picayune* for September 12.
>
> "Then, today, Mr. McKeithen, Governor McKeithen, seems to have said that Mr. Marcello was engaged in legitimate enterprises, but that he would still like to get rid of him out of the state."

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"My motion * * * this afternoon is for a five-month continuance. I feel we should not be obliged to try this case in this atmosphere at this time. *I am, naturally, withdrawing a request for a change of venue — I beg your pardon — I am not pressing my request for a change of venue at this time.*

* * * *

"I am only pressing at this time the request for a postponement until, unfortunately, I think until after election, and until after this publicity, which I feel may continue for some time."

But what transpired reflects clearly that the motion as filed and as then presented covered both continuance and change of venue because of inflammatory publicity. In reply to a specific question as to whether his motion was an alternative motion for continuance or a change of venue, counsel for Appellant replied, "The motion incorporated both, but I would be at a loss to suggest to the Court, if the Court were to ask me, where venue should be changed to."

The Government submitted the matter without argument.

The Judge then made it clear that with the motion for both change of venue and continuance immediately before him he would take the wisest tack and rule on the venue portion first since he had to rule on it at some time and "any continuance that might be granted * * * would depend upon the local atmos-

phere of that particular [transferee] district." His reasoning was that if he did rule that venue should be changed, he should not rule on the other half (the continuance portion) of the motion but rather should leave its disposition (along with the other 10 motions) to the Trial Judge in the transferee district.

There was no objection by Marcello or his counsel to this course of procedure. It was plain as could be that the Judge was going to rule on change of venue first. Again there was acquiesence with no — the word is no — objection.

This became doubly clear from the ensuing colloquy which made it positively evident to all present that on the basis of overwhelming evidence of adverse publicity (see notes 11, 12, 13, *supra*) the Trial Judge felt that Marcello could not get a fair trial in the Eastern District of Louisiana.[14] Before his final determination

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[14]The Judge figured that the possibility of Defendant's getting a fair trial would be greater if the change of venue was granted for several reasons. First, and most obviously, the newspaper articles were not circulated extensively or front-pagedly outside Louisiana. Concerning the *Life Magazine* article he realized the fact that it had nationwide circulation and the possibility of its affecting prospective jurors everywhere but concluded that any prejudicial effect would be magnified in Louisiana. Perhaps as an amateur but experience-trained psychologist-philosopher he emphasized that the *Life* article "put its finger on the State of Louisiana. And for that reason I am quite sure that the percentage of the people who read the articles, and who read them with a feverish intensity, were people who live in the State of Louisiana, because this is their state; whereas, maybe people in — well, what state was not mentioned? Montana? or Wyoming? Perhaps they were not quite as interested in it. We read generally what we are interested in, and what reaches us closest at home."

his purpose was simply but forcibly expressed. "Let me make it clear here that I will grant the motion for change of venue and leave all other motions * * *." Leaving no doubt what his conclusion was and that a change of venue would be ordered, the Court and counsel then discussed whether counsel should submit alternative districts, how many, and within what time they should be submitted. After more discussion concerning potential transferee districts with nary a sound of objection either from Marcello or his counsel, the Court granted defendant's motion for change of venue and determined that all other motions, including the motion for continuance should be transferred.

Although this exposition of fact would seem to be lengthy enough to determine one of the fifteen issues, it is not. A new wrinkle in the form of Mr. Marcello's attorney enters the chambers. Not more than ten minutes after counsel's motion so vigorously pressed had been granted, he appeared in the Judge's chambers and to Judge Heebe's "complete surprise" (*United States v. Marcello*, E.D. La., 1968, 280 F. Supp. 510, 512), requested withdrawal of the just-entered order. The Court asked for a written motion and memorandum, which counsel filed in the form of a "Motion to Reconsider Order Directing Change of Venue" and which was taken under submission after oral argument on September 22, 1967. At the hearing, it was argued that "in view of the fact that we are dealing with a Constitutional right, and in view of the fact that the Defendant desires to assert his Constitutional right to have a trial here, even though there is prejudicial

publicity, and in view of the fact that the provisions of change of venue are for the benefit of the Defendant, and since he does not desire to take advantage of it, I submit that this motion for reconsideration should be granted."

We see, as did Judge Heebe in his well written opinion *(United States v. Marcello, supra)* denying the motion, Marcello's contention as dual. He argues (i) that he withdrew his motion for change of venue at the original hearing and (ii) that even if he did not, he did not waive his Constitutional right to be tried in New Orleans.

Appellant's idea that he withdrew his motion is just factually incorrect as is clear from the events as set out above. Counsel's statement italicized *supra*, "I am, naturally, withdrawing a request for a change of venue — I beg your pardon — I am not pressing my request for a change of venue at this time" is obviously, shrewdly, and carefully not a withdrawal. Nothing said or done by Court or counsel could have left anyone, including specifically Marcello, in any doubt as to what was being argued and sought. Indeed, the fact that this exceptionally able, articulate advocate caught himself and restated his position is a positive refutation of any purpose to withdraw.

From the Judge's bench we can most clearly see that a determination not to press is not the same as a withdrawal. More than that, as a matter of fact it was not even a case of "not pressing". The running colloquy showed that it was being urged and consider-

ed, and at that point it was up to Marcello to advise the Judge that what had been sought and what obviously was being granted was no longer desired. The Judge had a serious duty both under the rules (see note 10, *supra*) and the Constitution. The evidence overwhelmingly proved that Marcello could not get an unprejudiced trial in New Orleans. No Judge worthy of the name could permit that to occur. The Judge could also see that if he did not grant a change of venue the case would begin with built-in grounds for reversal. In the face of this motion and showing by Marcello Judge Heebe stated and this Court agrees that it would have been utterly absurd to believe that if the motion had been denied and if Defendant had been convicted, a higher Court would then preclude the Defendant from arguing on appeal that the lower court had erred in denying the motion for change of venue on the basis that it had been abandoned.

The Judge was entitled, indeed required, to take Marcello's claim as presented and proved. His duty was to act and having acted it was not for the Defendant to reweigh the strategic or tactical disadvantages of the victory.

The second phase of Defendant's complaint is that even though the original motion may not have been withdrawn, Defendant himself did not knowingly waive his rights.[15] There is no question that these rights

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[15]Judge Heebe holds, clearly correctly, that the oral granting of a motion for a change of venue completes the determination process on that motion so that the granting is effective even though no written order has been issued.

may be waived. *Yeloushan v. United States,* 5 Cir., 1964, 339 F.2d 533. Nor is there any question that the waiver must be voluntary. We find that this record satisfies the essential factors of knowledge of the right, the free exercise of an uncoerced will, and conduct or action known to the accused which evidences an intent to waive.

The latter factor is met here by the filing and the affirmative presentation of the motion for change of venue. To persist in this in the face of the exchanges between Judge and counsel was to seek the advantage of a ruling which would be the very contradiction of a Sixth Amendment right to be tried in a district poisoned by prejudice. This record readily meets the famed standard: "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst,* 1938, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461. In assaying this Judge Heebe was warranted in considering Marcello's intelligence, articulateness and the exceptional competence of his three counsel. As the Court well knew, Marcello was no novice to litigation, criminal, civil and administrative, in many of which Constitutional rights were invoked.[16]

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[16]Here is a list of many of the cases to which Carlos Marcello has been a party.

A 1938 conviction on two counts of transferring marihuana in violation of the Marihuana Tax Act of 1937.

Marcello v. United States, 5 Cir., 1952, 196 F.2d 437, revers-

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In the presence of Marcello, Judge and counsel in the plainest of English words were discussing why trial in the Eastern District of Louisiana would not be fair and where a fair trial might be had. The Court made it plain he was going to transfer the case as a result of the motion made by Defendant and proved by him. The Judge was entitled to find as he did that Marcello's silence was approval of all that was going on. Both through counsel and personally Marcello had made, and was making, the choice to forego trial in a biased locale.[17]

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ing a conviction of contempt of the United States Senate.

A 1953 deportation order, appeal, and affirmance by the Board of Immigration Appeals.

United States *ex rel.* Marcello v. Ahrens, E.D. La., 1953, 113 F.Supp. 22 (habeas corpus proceeding holding deportation order valid), *aff'd sub nom.* Marcello v. Ahrens, 5 Cir., 1954, 212 630, *aff'd sub nom.* Marcello v. Bonds, 1955, 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107.

Marcello v. Brownell, D.C. Cir., 1957, 245 F.2d 279 (proceeding to deport holding Marcello to be deportable), *cert. denied,* 355 U.S. 903, 78 S.Ct. 331, 2 L.Ed.2d 260. Marcello v. Kennedy, D.D.C., 1961, 194 F.Supp. 748 remitting case to D.D.C., 1961, 194 F.Supp. 750 (declaratory judgment proceeding declaring deportation valid, *vacated and rem'd,* D.C. Cir., 1962, 312 F.2d 874, *cert. denied,* 373 U.S. 933, 83 S.Ct. 1536, 10 L.Ed.2d 692.

United States v. Marcello, E.D. La., 1962, 202 F.Supp. 694, ordering a hearing, E.D. La., 210 F.Supp. 892 (proceeding in nature of coram nobis to set aside original 1938 conviction denying relief), *aff'd,* 5 Cir., 1964, 328 F.2d 961, *cert. denied,* 377 U.S. 992, 84 S.Ct. 1916, 12 L.Ed.2d 1045.

Marcello v. CIR, 43 T.C. 927, 43 T.C. 928, *aff'd in part, rem'd in part,* 5 Cir., 1967, 380 F.2d 499, *cert. denied,* 389 U.S. 1044, 88 S.Ct. 787, 19 L.Ed.2d 835.

Marcello v. CIR, 5 Cir., 1969, 414 F.2d 268 (after remand).

[17]Quite apart from these factors showing personal acquiescence if not approval by Marcello, his attorney's actions may well have been binding on him as a conscious tactic. Henry v. Mississippi, 1965, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408. As was shown

The fact that Defendant did not withdraw his motion and his waiver before the motion was granted does not mean that the Trial Judge could not rescind his order. He clearly has the power to vacate at Defendant's request an order granting a change of venue. Whether or not he should do so is left to his sound discretion. In weighing the competing interests at that juncture, the Judge was nowhere near an abuse of discretion.

Recognizing that *Stevens v. Marks*, 1966, 383 U.S. 234, 86 S.Ct. 788, 15 L.Ed.2d 724 stands generally for the proposition that a Defendant ought to be allowed to withdraw a prior waiver of a Constitutional right when there is no justification otherwise, there was strong justification here. It would have been impossible for Marcello to receive a fair trial in New Orleans because of the continued and continuing unfavorable publicity. See notes 11, 12, and 13, *supra*. Nor was the Judge required after such a determination to regard it all as just so much a matter of tactics by clever resourceful advocates in what might well be a heads-I-win-tails-you-lose technique.[18]

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above, this venue maneuvering was clearly a tactic and under *Henry* a conscious waiver for the sake of giving defendant a tactical advantage is generally binding on defendant as an effective waiver.

[18]This had the marks of a preplanned attack. It was clear to the Judge, as it is to us; that if Defendant's motion for change of venue were denied and he had been convicted, then his conviction could easily be reversed on appeal and if the motion were granted, then he could use the procedure he is presently using.

A federal judge — in no sense a mere moderator — does not perform his awesome role by allowing "rights" to be moved like chessmen.

6. Place Of Trial

Appellant's sixth contention is not briefed but is that his second motion for change of venue, after the mistrial in Laredo, should have been granted because of adverse publicity in Laredo, Corpus Christi, San Antonio and Houston. There was clearly no error here because Defendant did not meet the formidable task facing a defendant seeking a change of venue, 4 Barron, Federal Practice and Procedure, § 2092 (1951 and supp.); 8 Moore, Federal Practice, ¶ 21.03 (2d ed., 1969); Annot., 10 L.Ed.2d 1243, 1272-87 (1964).

7. Suppression Of Subpoena

For his seventh attack Appellant urges that the District Court should not have suppressed the subpoena duces tecum (F.R. Crim. P. 17 (c))[19] served upon

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[19]F.R. Crim. P. 17(c) provides:

"(c) *For Production of Documentary Evidence and of Objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys." F.R.Crim. P. 17(c).

the Attorney General and calling for the production of the September 30, 1966 surveillance records and the personnel records of Collins.

He complains of suppression because he says the credibility of Collins, the complaining and key government witness, was sharply in issue. His contention might be somewhat better except for the fact that the Trial Judge did not suppress the subpoena as to Jencks Act[20] material. In fact, the Trial Judge was even more liberal than the Jencks Act requires — he directed the Government to allow Marcello's attorneys to peruse the statements before his trial began rather than, as is required by the Act, after the witness had testified at trial.

The Trial Judge did quash other portions of the subpoena and rightly so since forcing the government to bring these records to trial would have been unreasonable. The Appellant was clearly attempting to use Rule 17(c) as a discovery device, which it is not. *Bowman Dairy Co. v. United States*, 1951, 341 U.S. 214, 220, 71 S.Ct. 675, 679, 95 L.Ed. 879, 885; *Gilmore v. United States*, 5 Cir., 1958, 256 F.2d 565, 567. See 1 Wright, Federal Practice and Procedure, § 274 (1969).

8. Mafia References

Appellant's eighth claim in this inexhaustible opus is that the District Court should have declared a mistrial when the prosecution "improperly injected" Cosa

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[20] 18 U.S.C.A. § 3500.

Nostra and Mafia references into the trial. This contention fails because it is essentially a misstatement of fact. The prosecution did not inject anything into the trial. Rather the defense was the one who allowed the potion to be administered.

Here is how it happened. Collins was on the stand. Defense counsel was working on him after a relatively innocuous (as far as the Mafia medicine is concerned) examination. While questioning Collins, he — defense counsel — brought up for the first time the name of Michael Maroun, who was originally an attorney for Marcello in this action. He questioned Collins about two meetings with Maroun: one in the fall of 1967, in New Orleans at Lucky Pierre's Bar, and the other in Shreveport at the Town and Country Motel on February 12, 1968.[21]

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[21]We set out testimony pertaining to these two conversations verbatim.

Conversation at Lucky Pierre's Bar

"Q. Do you [Collins] recall having any conversation with him [Maroun] there?

A. Yes, sir. 15 or 20 minutes.

Q. Do you recall discussing this case with him?

A. No, sir. I did not.

Q. You had no discussion about this case with him at Lucky Pierre's?

A. No, sir.

Q. You don't recall telling him at Lucky Pierre's that this entire incident was an accident?

A. No, sir.

Q. You definitely did not make that statement?

A. No, sir."

Conversation at Town and Country Motel

"Q. Did you [Collins] have any conversation with him [Maroun] about this case on that occasion?

A. No, sir, not about this case.

Q. You did not discuss this case at all with him?

A. No, sir."

When defense counsel had finished, the prosecution's chief surgeon returned with what defense counsel saw as an enormous hypodermic needle to inject toxic references into the whole operation. But this misconceives the prosecution's action. Like most questioning in response to tactics or testimony given on examination by the adversary, when it comes to the opponents turn, the medicine may well turn out to be strong. But if it is, it may yet be a fitting antidote. Here is what actually occurred on redirect:

"Q. Now, you were asked about a meeting with Mike Maroun at Lucky Pierre's in November of 1967 in New Orleans?

A. Yes, sir.

Q. Who is Mike Maroun, Mr. Collins? Do you know?

* * * *

A. Long-time business associate of Carlos Marcello. Close personal confidante, nightclub manager, does an act and he's a lawyer, also.

* * * *

Q. Now, without going into the details, Mr. Collins, of the conversation, we want you to tell the court and the jury the general subject matter of the conversation as it occurred during this particular night at Lucky Pierre's. Just the subject matter, not all the details.

* * * *

A. The main subject which took up well over half the time was Maroun's repeated state-

ments to me about, 'we know which of our phones we have tapped. We know which of our rooms you have wired.' And he kept going on like that.

* * * *

Q. Again with the same limitations as we had to the Lucky Pierre conversation, what were the subject matters and the discussion that night [at the Town and Country Motel]?

A. Again, the big thing he spoke of was wire tapping, listening in and we did discuss La Cosa Nostra, the American Mafia."

At this stage the jury was removed and Appellant moved for a mistrial, which the Trial Judge refused, but he did instruct the jury to disregard the statement.[22]

The arguments of both sides are simple. Appellant argues that the statement was so prejudicial no limiting instruction could possibly have cured it. The Government argues that Appellant's counsel was the one who sowed the seeds of the whole conversations and what he sowed that shall he also reap including any prejudicial effects flowing from the interrogation and response, whether initially or in elaboration on redirect examination.

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[22]He said: "Do not consider it for any purpose. Forget it. Don't talk about it. Don't let it enter into your discussions."

Defense counsel presumably thought it helpful to show through Collins that Maroun and Collins had discussed the assault and that Collins had mentioned to Maroun several things detrimental to the Government's case. Since the Government could then anticipate that at some stage Maroun would — as he later did (see contention #9, *infra*) — testify to his version of the conversation, the Government had every right to rebut this idea and at the same time bolster the credibility of Collins. In view of the fact that Collins did have a conversation with Maroun and did talk about something, an entirely proper area of inquiry was the subject matter of the conversations. That called for testimony on who said what he said or said was said.

Additionally, there is nothing here to indicate that in the course of this legitimate interrogation the Government counsel was seeking to bring out "Costa Nostra" or that it would even be mentioned. More than that, from the conversation the connection between Marcello and the Mafia was verbally nonexistent, and by implication only the very slightest. Indeed, on Collins' version Maroun was talking about the Mafia, not who the members or associates were.

The testimony, spontaneously volunteered by the witness, was relevant to a subject first broached by Appellant, the connection between him and the utterance was weak, the prejudice to him, if any, was slight, and the jury was properly instructed in a manner which did not cast a spotlight on the statement itself, (see note 22, *supra*). In this light the instruction was suf-

ficient and a declaration of mistrial was not appropriate, much less mandatory.

9. Grab Bag of Prosecutorial Misconduct

Appellant's ninth contention is hexagonal and deals with several acts of the prosecution both before and during trial. Three of these can be dealt with in short fashion. Appellant first complains of allegedly prejudicial announcements made by a Justice Department coordinator to the New Orleans press on September 29, 1966 (see note 11, *supra*). These statements were made prior to the alleged violation here, have nothing to do with this case, and thus do not call for reversal. Appellant's second complaint is that at pretrial argument Government attorneys misrepresented that certain evidence was not in their possession. Appellant does not document this complaint and points to no injury from a misrepresentation if in fact one occurred. Appellant's third complaint — the Government failed to allow him to inspect an exhibit in conformity with a discovery order — is unfounded because the order was conditioned upon Defendant's making a similar tender, which he apparently did not do.

Appellant's fourth subpoint is that mistrial should have been declared because the prosecuting attorney in his closing argument supposedly cast aspersions on defense counsel and accused two defense witnesses of lying. The testimony and statements are obviously important here. At the first trial (which ended in a hung jury in Laredo) Michael Maroun testified that he had met with agent Collins at the Town and Country

Motel on February 5 (see text and note 21, *supra*) and that the next day he had dictated a memorandum dated February 6 to the effect that Collins told him that he was not put in fear on the night of the alleged assault, was not injured and that Marcello would clearly win his case either at the trial or appellate level. At the second trial it came out that the meeting was really on February 12 and not on the 5th. Maroun attempted to explain the discrepancy between fact and his memorandum by stating that his secretary had misdated the memorandum.

These facts were brought out on the second trial and not unnaturally capitalized upon by the prosecution in closing jury argument.[23] The defense objected on the ground that the prosecuting attorney had deliberately made an accusation against defense counsel. The Trial Judge stated that he did not so construe the argument, and as it said nothing about the Defendant he overruled the objection.

Another prosecution jury argument complained of was aimed at defense witness Katherine Angel's testimony that she had noted the date February 12 on her calendar as the night she met Collins. The prosecuting attorney mentioned her calendar and this notation in

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[23] "So they have a memorandum dated February the 6th. Six days prior to the event saying what Collins is alleged to have said, and the meeting had never taken place. Now, this is unbelievable. And what happened, ladies and gentlemen? When it came time for Mr. Maroun to testify on the prior occasion, the defense decided that they needed some kind of memorandum to impeach Agent Collins so they made up this phony memorandum."

a light the defense found objectionable. He stated that "God only knows when she went back and inserted the date of February 12," and referred to the memorandum as the "skunk in this case".

Defendant also complains of arguments to the effect that defense counsel were not being fair in their presentation of evidence, that Mr. Maroun was not telling the truth, that others were not telling the truth, and that for this reason the whole defense was an insult to the jury's intelligence.

Appellant presents three reasons why the closing jury argument was highly improper: First, because it charged the defense and defense witnesses with fabrication of evidence, second, because the prosecution commented on a memorandum which was not in evidence (Maroun's memo dated February 6), and third, because the prosecutors expressed their personal opinion.

As to Appellant's first reason, the prosecution could legitimately attempt to persuade the jury that there were facts tending to support the conclusion that Maroun and Angel were not telling the truth in relating what Collins said (see note 21, and related text, *supra*) and that on the contrary Collins was telling the truth in his denial of any such statements. In this swearing match over what Collins said he said or what others said Collins said, much emphasis was focused on the disparity of time — whether the conversation was on February 5 or 12 — and the memorandum which, offered as proof positive of the meeting, itself turned out to be in error.

This memorandum, its existence and accuracy ties into and refuted Appellant's contention that the prosecution improperly commented on a memorandum which was not in evidence. Of course, there is no question that "It is improper for counsel to express his personal opinion or to state facts of his own knowledge, not in evidence, and not part of the evidence to be presented; or to make unwarranted inferences or insinuations calculated to prejudice the Defendant." *Dunn v. United States,* 5 Cir., 1962, 307 F.2d 883, 886 quoting from *Taliaferro v. United States,* 9 Cir., 1931, 47 F.2d 699. But the fact of the matter here is that the prosecutor's comment was not aimed at the memorandum itself but rather was aimed at testimony concerning the memorandum. This testimony was a matter of record, was given in the first trial, and had been referred to in the second trial. Thus the prosecution's argument was not aimed at a fact not in evidence and was proper.

As to Appellant's last subcontention, we know from *Dunn, supra* that "It is improper for counsel to express his personal opinion * * *." In this case we do not regard the prosecution as expressing its personal opinion. Rather these were legitimate forensic arguments pointing out to the jury why, to the minds of the reasonable persons jurors are supposed to be, the contentions of the Defendant could not pass muster, were arguments which could not prevail, and hence were claims which were not fair since they could not fairly be credited by fair, disinterested jurors. The upshot is that none of the arguments in the face of hotly con-

tested issues of fact were improper, and certainly none were prejudicial.

10. Knowledge as an Element

Appellant's tenth contention is that the District Court erred in not instructing the jury that knowledge of the status of Collins was an element of the offense of assault and intimidation of an FBI agent under 18 U.S.C.A. § 111.[24] Our holding in *Bennett v. United States*, 5 Cir., 1960, 285 F.2d 567, *cert. denied*, 1961, 366 U.S. 911, 81 S.Ct. 1087, 6 L.Ed.2d 236, which is still very vital, see *Burke v. United States*, 5 Cir., 1968, 400 F.2d 866, *cert. denied*, 1969, 395 U.S. 919, ____ S.Ct. ____, 23 L.Ed.2d 237; *Pipes v. United States*, 5 Cir., 1968, 399 F.2d 471, *cert. denied*, 1969, 394 U.S. 934, ____ S.Ct. ____, 22 L.Ed.2d 464, clearly holds that "scienter is not required either in the indictment or in the proof to sustain a Section 111 conviction." *Pipes, supra* at 472. See also *United States v. Wallace*, 4 Cir., 1966, 368 F.2d 537, 1967, *cert. denied*, 386 U.S. 976, 87 S.Ct. 1169, 18 L.Ed.2d 136; *United States v. Lombardozzi*, 2 Cir., 1964, 335 F.2d 414, *cert. denied*, 379 U.S. 914, 85 S.Ct. 261, 13 L.Ed.2d 185.

11. Willful Intent To Injure

In his eleventh argument Appellant contends that the Court erred in refusing to charge that the offense

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[24]See note 1, *supra*.

of forcible assault[25] required a willful attempt and intent to inflict violent or serious injury. The Court charged that the word "'assault' * * * means any intentional and unlawful threat or attempt to commit injury * * *."[26] He then defined "forcibly" as "the use of force."

Defendant contends that the Trial Judge should have included as inherent in his definition of assault the idea of violence so that the crime charged would a-

---

[25]See note 1, *supra*.

[26]The Court charged:

> "The word 'assault,' as used in the indictment and in this charge, means any intentional and unlawful threat or attempt to commit injury upon the person of another, when coupled with an apparent present ability so to do, and an intentional display of force such as to place the victim in reasonable apprehension of immediate bodily harm, constitutes an assault. An assault may be committed without actually touching, striking, or committing bodily harm to another.
>
> "The word 'forcibly,' as used in the indictment and in this charge, means simply the use on the part of Carlos Marcello of force upon or toward Patrick J. Collins, Jr.
>
> "The word 'intimidate,' as used in the indictment and in this charge means simply to make timid or fearful or to inspire or affect one with fear.
>
> "In connection with the word 'forcibly' and the word 'intimidate,' it is not necessary that Patrick J. Collins, Jr., believed that any bodily injury he might sustain would be great or severe. For instance, attempting to strike a person with an open hand might constitute an assault, although that person knows that a blow by the open hand is not normally calculated to cause any serious bodily injury. Therefore, it is sufficient if the attempt to use force causes a person such as Patrick J. Collins, Jr. to reasonably believe that some injury might be inflicted although such injury might not be severe."

mount to a "*forcible and violent* threat or attempt to commit injury" or a "*forcible* threat or attempt to commit a *violent* injury." Each of the words, "force" and "violence," when used alone in conjunction with "assault" conjures up the same idea and means the same thing.[27] Thus to include the idea of violence in the definition of assault would make the phrase "to forcibly assault" a tautology.

When the idea of violence is used as an adjective for "injury", it still does not necessarily connote a serious injury — it merely means an injury by violent or forceful means. Thus the use of the word "violent" in describing a potential injury resulting from a forcible assault is also redundant. The authority Appellant cites for the proposition that § 111 requires an attempt and intent to commit a serious injury hold only that the attempt must be accompanied by a degree of force or violence, not that the resulting or intended injury must be serious.

12. Entrapment

Appellant's next contention is that the Court should have submitted the issue of entrapment to the jury. There is no question that the issue of entrapment does not have to be submitted, but rather can be found as a matter of law, if it is obvious that the substantive factors of the defense are all present. *Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848.

---

[27]Webster's New International Dictionary (2d ed.) defines violence in terms of force: "Power, violence, compulsion, or constraint exerted upon a person or thing."

See *Lathem v. United States*, 5 Cir., 1958, 259 F.2d 393, 396; *Suarez v. United States*, 5 Cir., 1962, 309 F.2d 709. The converse is also a maxim of criminal law — that when the evidence does not raise entrapment, the issue should not be submitted. *Brainin v. United States*, 5 Cir., 1963, 314 F.2d 460; *United States v. Alford*, 2 Cir., 1967, 373 F.2d 508, *cert. denied*, 387 U.S. 937, 87 S.Ct. 2062, 18 L.Ed.2d 1003; *United States v. Gosser*, 6 Cir., 1964, 339 F.2d 102, *cert. denied*, 1965, 382 U.S. 819, 86 S.Ct. 44, 15 L.Ed.2d 66; cf. *Brooke v. United States*, D.C. Cir., 1967, 385 F.2d 279.

The elements of the entrapment are well known. *Sorrells v. United States*, 1932, 287 U.S. 435, 442, ___ S.Ct. ___, ___, 77 L.Ed. 413, 417; *Sherman v. United States, supra*, 356 U.S. at 372, 78 S.Ct. at ___, 2 L.Ed.2d at 851.

In the instant case there is no evidence tending to show any of these elements of the defense. The evidence shows that Marcello had begun his angry charge at the group of reporters before Collins arrived. This certainly shows that his design and disposition to commit the offense were present before Collins' arrival and thus could not have originated with or been induced by a government official. After Collins' arrival it is true that his presence and refusal to back down when Marcello asked "Are you looking for trouble?" afforded opportunity to commit the offense, but this does not constitute implantation of the disposition to commit in the mind of an innocent man, or inducement for the purpose of prosecuting. *Sorrells* and *Sherman, supra*.

The Trial Judge was eminently correct in not submitting the issue of entrapment.

13. Election

Appellant's thirteenth contention is that the Trial Court should have granted his motion to require the Government to elect between the issues of assault and intimidation. His contention is based on the idea that "assault" and "intimidation" mean the same thing and constitute the same offense and therefore only one should have been submitted. The contention is groundless because the statute prescribes two different offenses. See Black's Law Dictionary 4th ed. One might be guilty of one or the other or both.

14. Motions

Appellant's fourteenth contention is that, since the case was submitted in the alternative on the issues of forcible intimidation and forcible assault, and since neither substantial evidence nor evidence more consistent with guilt than with innocence existed, his motion for acquittal and motion for arrest of judgment and a new trial should have been granted.

The question of whether Marcello actually committed the act that he was accused of committing is a question for a well-instructed jury if the evidence is substantial enough to establish a case from which the jury may infer guilt beyond a reasonable doubt. *McFarland v. United States*, 5 Cir., 1960, 273 F.2d 417, 419. In determining whether the evidence is sufficient,

it must be viewed in the light most favorable to the Government, *Glasser v. United States*, 1942, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, and all inferences that may reasonably be drawn from the facts must be considered. *United States v. Gottlieb*, 5 Cir., 1969, ___ F.2d ___, ___ [No. 26343, Dec. 9, 1969 at 6]; *Peters v. United States*, 5 Cir., 1967, 376 F.2d 839. Without further lengthening an already lengthy opinion by setting out all the evidence we view as supporting the Government's case, we hold that there is more than ample evidence from which the jury could find that Collins was either forcibly assaulted, intimidated, or both.[28] The punch in the face was a forcible assault (see contention #11, *supra*). And since this more than put Collins in fear of being struck, it constituted forcible intimidation as well.

15. Sentence

Marcello's last contention is that the District Court should not have utilized "brushes with the law" in imposing sentence in this case.[29]

There is no question that the Trial Judge in determining sentence can go outside the record and consider Defendant's past conduct and activities. *Williams v. New York*, 1949, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed.

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[28]Marcello's objections to the sufficiency of the evidence also involve the correctness of the Court's charge and the definitions of "assault," "intimidate" and "forcibly". We have already discussed this area and held against Marcello (see point 11, *supra*).

[29]The sentence imposed was two years and a $5,000 fine out of a maximum 3 years and $5,000 fine.

1337. Defendant does not seem to quibble with this statement of the law. What he does quibble with is the type of outside information used. Appellant pinpoints as error the Judge's verbally taking into account two Court proceedings which he ultimately won. But the Judge's oral summation of the presentence report which he obviously had considered and which the rules call for (F.R. Crim. P. 32(c)) reflected that there was at least one instance, if not more, in which Appellant was finally convicted of criminal offenses. There was nothing to indicate that the Judge was retrospectively punishing him for having successfully invoked Constitutional rights. A Judge is by no means confined to a history of criminal convictions. The activities of the Defendant, including his relation to public and police authorities, his position in the community and other factors bear upon his life and lead the sentencing Judge to a balance on (i) punishment, (ii) deterrence and (iii) rehabilitation.

Windup

Having found each of the fifteen attacks wanting, the conviction must stand.

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 26773

D. C. Docket No. 68-L-89-Criminal

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CARLOS MARCELLO,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, Chief Judge, DYER, Circuit Judge and HUNTER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

February 18, 1970

Issued as Mandate

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By Rosalie Aument
Deputy

New Orleans, Louisiana APR 3, 1970

APPENDIX D

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26773

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CARLOS MARCELLO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(April 1, 1970)

Before BROWN, Chief Judge, DYER, Circuit Judge and HUNTER, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1488

CARLOS MARCELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of having assaulted or intimidated a federal agent in the performance of his official duties, in violation of 18 U.S.C. 111. He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. B).

The evidence showed that on September 30, 1966, an FBI agent approached Joseph Marcello, Jr., petitioner's brother, in the lobby of a New York City

hotel and asked him whether he and his brother were returning to New Orleans that evening.[1] The lawyer for the Marcello brothers, to whom the question was referred, told the agent the flight number of the plane the brothers were taking to New Orleans that evening (R. 1172-1174).[2] The same day two other FBI agents, Patrick Collins and Joseph Avignone, were assigned to be present at the New Orleans airport to observe and photograph the deplaning of petitioner and his brother in order to determine who met them at the airport. Agent Avignone was to carry a movie camera and agent Collins was assigned to accompany him (R. 837-839, 931-932). Two police officers were also assigned by the New Orleans police force to observe petitioner's arrival from New York (R. 1021-1022, 1040-1041). In addition, newspaper and television photographers and a television reporter were present either to take pictures of petitioner's return or to interview him (R. 916-917, 1079-1081, 1290).[3]

Between 9:00 and 9:30 p.m., the plane carrying petitioner and his brother arrived in New Orleans (R. 917). When the brothers exited to the corridor leading to the main airport lobby the photographers, including FBI agent Avignone, began taking pictures and continued the picture taking in the lobby (R. 841, 918-919). In the lobby, the Marcello brothers

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[1] Petitioner was in New York to testify before a grand jury. *United States* v. *Marcello*, 280 F. Supp. 510, 515 (E.D. La.).

[2] Petitioner says this information was given to the agent with his approval (Pet. 7).

[3] Some of the media personnel knew that Collins and Avignone were FBI agents (R. 877, 922, 1293).

were met by petitioner's son (R. 920). FBI agent Collins walked behind the Marcello brothers and the photographers (R. 934).

The Marcello party and the photographers went out the front door of the airport terminal building to the adjacent upper automobile ramp. As the Marcello party was walking to their automobile, petitioner turned and advanced toward the photographers (R. 842-844). One of the Marcellos yelled "haven't you got enough pictures" and uttered an obscenity (R. 921, 935-937, 1026-1031, 1081). Petitioner approached agent Avignone, who was standing near a protective railing overlooking an automobile drive area some 25 to 30 feet below (R. 843). Agent Collins moved forward to intercede, if necessary, on behalf of agent Avignone. Petitioner looked at Collins, said "I'm the boss here" and asked Collins if he were looking for trouble (R. 846). Collins, who also was close to the railing, replied that he could handle trouble. Petitioner then jabbed at Collins, making some body contact (R. 846, 939-940, 944).[4] Petitioner was restrained by his brother and son and by an airport policeman who came on the scene. The Marcello party then entered their automobile and departed (R. 853, 1035).

In urging that the petition for a writ of certiorari should be denied, we rely in the main on the thorough opinion of the court below (Pet. App. B 1-39). The single contention advanced here to which we deem it

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[4] At this point, witnesses at the scene were apprehensive that someone would go over the railing (R. 1081, 1087-1088, 1134, 1294, 1302-1303).

appropriate to respond is the claim of double jeopardy (Pet. 15-18).

The indictment alleged that petitioner did "forcibly assault and intimidate" the federal agent in the performance of his official duties. At a first trial, the judge's instructions dealt only with the meaning of "assault" and omitted any reference to the intimidation branch of the statute and indictment (R. 672-679). After retiring for its deliberations, the jury sent in a note asking the court again to explain the definition of "assault and intimidate." The trial judge charged that, although the indictment used the term "intimidate" as well as "assault," the government need not prove that the defendant did both. The court then stated (R. 687-688):

> As I understand the Government's case, and the evidence which was offered, the evidence was not directed at showing that there was any intimidation of Mr. Collins, but rather that there was an assault.
>
> So I think for practical purposes you may forget the part "and intimidate" and consider the indictment as though the charges were only as to assault.

The jury thereafter was unable to agree on a verdict and a mistrial was declared (R. 692).

At the instant trial before a different judge, defense counsel, prior to the court's instructions, objected to the submission to the jury of both aspects of the indictment (assault and intimidate). The objection was not based upon the theory of collateral

estoppel asserted here,[5] but on the assertion that, in the circumstances of this case, there was no distinction between the two charges and therefore the government should elect which aspect it wished submitted (R. 1284-1285, 1324-1326; see Pet. App. B 37). The trial judge denied the motion, finding there was a legal distinction between "assault" and "intimidate" in that the latter did not require proof of an apparent present ability to commit bodily harm; in this case the defendant's statements "I'm the boss of this town," followed almost immediately by the inquiry "Are you looking for trouble?", in the context in which made, were sufficient to warrant a finding of intimidation (R. 1327-1328).[6] Subsequently, the court instructed on both aspects of the indictment (R. 1401-1402) and the jury returned a general verdict of guilty.

Petitioner contends here that the trial judge's statement at the first trial quoted above (p. 4, *supra*) amounted to a directed verdict of acquittal as to "intimidation" which constitutionally precluded the government from again raising and arguing "intimidation" at the second trial under the doctrine of collateral estoppel. See *Sealfon* v. *United States*, 332 U.S. 575; *Ashe* v. *Swenson*, No. 57, O.T., 1969, decided April 5, 1970, where the Court stated, slip op., p. 7:

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[5] This claim was first raised by defense counsel in the court of appeals.

[6] The court of appeals expressly affirmed this decision in its opinion (Pet. App. B 37).

> "Collateral estoppel" * * * means simply that when an issue of ultimate fact has once been determined *by a valid and final judgment*, that issue cannot again be litigated between the same parties in any future lawsuit. * * * [Emphasis added.]

We cannot agree that the judge's statement at the first trial constituted a "final judgment" determining "an issue of ultimate fact" as to the intimidation aspect of the indictment. The only "judgment" at the first trial was the order declaring a mistrial. And the judge could not have entered a judgment with respect to intimidation as distinct from assault, since they are not separate offenses under the statute but merely different methods of committing the same offense, which was charged in a single count against petitioner.[7] There is no principle that binds the government, following a mistrial, to present its evidence verbatim as it was presented at the first trial, or that requires the trial judge to repeat verbatim the instructions given at the first trial.

Moreover, petitioner never raised this issue at trial. Indeed, defense counsel's motion at the second trial (which was denied) to require the government to

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[7] The court of appeals, in its discussion of "Election" (Pet. App. B 37), states that assault and intimidation are two different offenses. The court, which was dealing with petitioner's argument that assault and intimidation mean the same thing, properly held that they did not. It did not, we believe, mean to decide that petitioner could have been separately convicted and separately punished for both assault and intimidation.

elect between "assault" and "intimidate" indicates clearly that petitioner did not then view the government as being collaterally estopped from raising the issue of "intimidation". Accordingly, he cannot now, as an afterthought, be permitted to set aside his conviction on this tenuous basis.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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MAY 1970.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1488

CARLOS MARCELLO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals, Fifth Circuit

PETITION FOR REHEARING ON DENIAL OF CERTIORARI

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IN THE
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OCTOBER TERM, 1969

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CARLOS MARCELLO,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals, Fifth Circuit

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PETITION FOR REHEARING ON DENIAL OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Carlos Marcello, prays that this Court grant a rehearing of its order of June 15, 1970, denying petition for a writ of certiorari.

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT

In applying for a rehearing of the denial of certiorari here, petitioner finds no problem in presenting new

matter, not previously urged. In order to present these issues properly we quote from the opinion of the United States Court of Appeals for the Fifth Circuit, relative to the facts of this case.

> "On September 30, 1966, Carlos Marcello arrived at the New Orleans airport where, because of his reputation as a mafia boss, he was immediately surrounded by newspapermen and photographers. Among this group was F.B.I. agent Patrick Collins, posing as a deplaning passenger, and his co-agent photographer whose job it was to keep an eye on Marcello. This crowd followed Marcello through the airport and onto the upper ramp outside where Marcello, angrily and with some profanity, inquired whether the photographers had taken enough pictures.
>
> Collins, with arms folded, answered in the negative, and Marcello retorted: 'Are you looking for trouble?' which elicited the not unexpected reply from Collins that 'I can handle trouble.' This exchange had an unsettling effect on Marcello who took a couple of short jabs at Collins and attempted to mow him down with a haymaker which never really got off the ground because of his brother Joseph's restraint."

While we cannot agree that the evidence supports this summation of events, we can accept this interpretation by the Fifth Circuit for the purpose of this peti-

tion to establish a single fact, and one which the government does not contest: Carlos Marcello did not know Patrick Collins was a Federal Agent, and Collins deliberately and with intention made no effort to convey this information to Marcello. In fact, Collins withheld it from him.

Marcello was indicted for forcibly assaulting and intimidating an Officer of the F.B.I. in violation of 18 U.S.C.A. 111, which provides:

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in Section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000.00 or imprisonment not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both."

The District Court refused to charge the jury that knowledge that Patrick J. Collins was an F.B.I. agent engaged in the performance of his duties was an element of the offense. Petitioner raised the issue on appeal before the Fifth Circuit, in his application for a rehearing, and in the petition for a writ of certiorari in this Court, wherein it was shown that there is a split in the various Circuits on this point, and that the view

of the District and Circuit Court in this case is in direct conflict with the decision of this Court in *Pettibone v. United States*, 148 U.S. 197 (1892).

In *Pettibone*, this Court made clear that knowledge was an essential element of the statute involved therein. The defendant must know that the offense was being committed against a federal officer in the performance of his duty.

THE REBELLIOUS CIRCUITS

In *Bennett v. United States*, 285 F.2d 567, (1960) the Fifth Circuit swept away all of the prior jurisprudence which required knowledge on the part of the defendant of the official character of the federal officer and followed the apostate ruling of another Circuit. In effect, these Circuits have overruled this Court, for *Pettibone v. United States*, supra, remains the law of the land. Without belaboring the point, the fact is that petitioner could not have been convicted in any but the Second, Fourth, Fifth and Ninth Circuits. The jurisprudence was set out in our original petition for writ of certiorari on pages 21, 22, and 23.

The denial of the petition for a writ of certiorari extinguishes petitioner's hopes that he might rely on this Court's ruling in *Pettibone vs. United States*, supra, over those decisions of the rebellious Circuits. *But*, the elimination of this hope raises a new issue:

18 U.S.C.A. 111 IS UNCONSTITUTIONAL AS NOW INTERPRETED

If the element of knowledge is not essential to the offense charged, 18 U.S.C.A. 111 is clearly unconstitutional, and violative of petitioner's rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States. *Indeed it is the element of knowledge that rescues this statute from unconstitutionality,* for a criminal statute, in order to be valid and enforceable, must define the offense so specifically or accurately that anyone of ordinary intelligence will know when or whether his conduct is on one side or the other side of the border line between that which is and that which is not denounced as an offense against the law.

Our basic law insures that no one can be held accountable, or subject to criminal prosecution, for any act done by him unless and until that act has been denounced as a crime and has been punishable in a statute that defines the act sought to be denounced with such precision the person sought to be held accountable will know his conduct is such that it falls within the purview of the act intended to be prohibited.

The pertinent statute here makes it an offense to assault, resist, oppose, impede, intimidate, or interfere with a federal officer. It does not in any way define a specific action which is punishable, and leaves to the Courts and juries the task of interpreting and defining the series of verbs contained in the statute. It punishes all acts which in the estimation of the Court and jury

fall within their definition of the verbs, assault, resist, oppose, intimidate or interfere. Courts cannot, under the guise of interpretation, assume legislative functions, for if they could, there would be no certain or understandable rule and no uniform standard of conduct to guide the individual in ascertaining what acts it is his duty to avoid, doing violence not only to the constitutional requirement that the ascertainable standard of guilt by which all citizens are to be guided be fixed by the legislative branch of the government but also to the equal protection and due process clauses safeguarding against discrimination.

In *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, this Court ruled: "Congress alone has the power to define crimes against the United States. This power cannot be delegated either to the Courts or to the juries of this Country". The inquiry in Cohen, as here, is whether the statute constitutes a fixing by Congress of an ascertainable standard of guilt adequate to inform persons accused of the nature and cause of the accusation against them. See also *United States v. Reese*, 92 U.S. 214, 219-220; *United States vs. Brewer*, 139 U.S. 278, 288; *Todd v. United States*, 158 U.S. 278, 282.

Obviously the pertinent statute here was designed to protect federal officers in the performance of their duties and to federal jurisdiction over offenses against them. **The only reasonable and constitutional interpretation of the statute is that identified federal officers must be obeyed and are protected from violence in the performance of duty. The statute was not designed to punish the unknowing individual who refuses to obey a federal officer**

who is deliberately concealing his identity. As this Court said in *United States v. Reese*, 92 U.S. 214, 221: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the Courts to determine who could be rightfully detained, and who should be set at large."

If knowledge is not an essential element of this offense, it leaves to the Justice Department, the various United States Attorneys, the Courts and Juries of the land, and any of them, the right to define conduct which is punishable under this statute as well as who should or should not be punished. For example, a traffic accident and ensuing argument between a federal agent, where the other party refuses to allow the unidentified agent to leave the scene, a person who refuses to be taken into custody by an unidentified agent and resists arrest and detention, a person, be he criminal or not, who protects his home and family against the unlawful intrusion into his home by the unidentified agent and on and on, until the mind boggles with possible deportment which could be deemed criminal under the statute. *If knowledge of identity is not essential, Congress has indeed set a "net" so large that anyone coming in contact with federal agents is in jeopardy of indictment and conviction, particularly persons at odds with the government, as in the case of the petitioner.* Congress cannot validly enact a statute creating a federal crime relying on "common law crimes". The statute here does just that if the element of intent and knowledge are not essential.

Assault is a *statutory*, not common law crime, in every state in this country, and each state criminal code sets out the elements of the crime. The State of Louisiana, wherein the events of this case took place, has a statute protecting state and local police officers and it is identical to 18 U.S.C.A. 111, with the exception that knowledge of the official character of the victim is essential. The need of this element is more easily seen if an assault is not involved, but rather resistance, or opposition to an unidentified federal officer. What conduct constitutes opposition? impediment? resistance? intimidation? And how can anyone be held accountable under a special statute covering officials, if knowledge of the identity of the officer is not present.

One is permitted to oppose, impede and resist his fellow citizen with immunity as long as the nature of that conduct is not criminal. The uniformed policeman wears his badge and failure to heed this symbol of authority in an offense. His word is law on the street and can only be questioned before a Court. His identity and authority are apparent. But how, under the law, can a person be punished for failure to heed the disguised federal officer who assumes another role, and deliberately withholds his official identity. The uniform and badge deter resistance. The identification card of the F.B.I. agent has the same effect. Even the verbal admonition "Police Officer" would suffice. But to jail a man for intimidation of an F.B.I. agent who has *intentionally* withheld his identity is not only constitutionally invalid, it is also ludicrous and shameful. Congress did not intend such nonsense. 18 U.S.C.A. 111 is nothing more than a federal statute tracking the classic offense of "resisting arrest" punishable in all of the states.

Verbal exchanges between the unwary citizen and the federal agent in mufti became possible criminal conduct, to which there is no defense, if this statute is constitutional as now interpreted. How absurd.

No one is safe, unless of course, we assume that federal agents are infallible. And what a marvelous gimmick for the federal agents who have now been given by bad jurisprudence, created through dicta from the apostate Circuits which have abandoned the wisdom of this Court in *Pettibone v. United States,* supra, the right to go out and bust *anybody,* simply by withholding their identity and arousing a little resistance or opposition. Or, is a little resistance or opposition sufficient. Well, the statute doesn't say and the Courts and juries will have to guess if this conviction is allowed to stand. And that is our case..... The Constitution protects the people — yes, even Carlos Marcello — from this unhappy possibility.

Congress intended knowledge and intent essential elements. If not, the statute is clearly unconstitutional. In either case, the Marcello conviction must be reversed.

It is enough to say that had Marcello known Collins was an F.B.I. agent, Marcello would have respected his office, and the incident would not have occurred.

For the foregoing reasons, we submit that major constitutional questions are raised, involving all persons coming in contact with federal officers.

We respectfully pray that the rehearing should be granted, and the writ of certiorari granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

Of Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Cecil M. Burglass, Jr. a member of the Bar of this Court in good standing and of counsel for petitioner in the above application for rehearing, do hereby certify that a copy of the foregoing petition for rehearing has been served upon the Solicitor General of the United States of America, United States Justice Department, Washington, D. C., by posting same, postage prepaid addressed to his respective office on the 3rd day of June, 1970.

Cecil M. Burglass, Jr.